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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the drafters and sponsors of Michigan's Proposal 2, a successful popular initiative amending the Michigan Constitution to prohibit discrimination by the state on the basis of race or sex, have a right under Federal Rule of Civil Procedure, Rule 24(a) to intervene in federal court in post-election litigation challenging the constitutionality of that initiative.

2. Whether elected officials who vigorously opposed Proposal 2 may be deemed to adequately represent the interests of the initiative's drafters and sponsors, for purposes of denying those drafters and sponsors intervention as of right under Rule 24(a) to defend the constitutionality of Proposal 2.

PARTIES TO THE PROCEEDINGS

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan Constitution (Proposal 2). Petitioner was an appellant below.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. Petitioner was an appellant below.

The Respondents in this Court are: Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Deneshea Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turquoise Wise-King, Brandon Flannigan, Josie Hyman, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmation Action Party. They were plaintiff/appellees below.

The Respondents in this Court are: Chase Cantrell, Melinda Nestor, Chidimma Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Toniesha Jones, Seger Weisberg, Jay Robinson, Casey R. Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, and Mark C. Carter II. They were plaintiff/appellees below.

Other Respondents in this Court are: Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University. They were defendant/appellees below.

The Respondents in this case are: Michael Cox, in his Official Capacity as Attorney General of the State of Michigan and Eric Russell. They were defendant-intervenors below.

Governor Jennifer Granholm, in her Official Capacity as Governor of the State of Michigan, was a named a defendant below. She was dismissed from the consolidated actions below on August 15, 2007, and September 6, 2007.

CORPORATE DISCLOSURE STATEMENT

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan

Constitution (Proposal 2). It has no parent company, and no publicly held companies hold any stock of the Petitioner.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. It has no parent company, and no publicly held companies hold any stock of the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michigan Civil Rights Initiative Committee and American Civil Rights Foundation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The initial opinion denying Petitioners' motion to intervene under Federal Rule of Civil Procedure, Rule 24(a) is reported at 240 F.R.D. 368 (E.D. Mich. 2006) and reproduced in the Appendix (App.) at B. The decision of the court of appeals affirming denial of intervention is reported at 501 F.3d 775 (6th Cir. 2007), and is reproduced in the Appendix at A. Rehearing and rehearing en banc denied December 17, 2007, is reproduced in the Appendix at C.

JURISDICTION

The Sixth Circuit denied rehearing and rehearing en banc on December 17, 2007. App. C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("In view of our decision herein, we think that section 1254(1) permits us to review the orders denying intervention.").

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, Rule 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

STATEMENT OF THE CASE

A. The People of Michigan Overwhelmingly Vote to End Official Discrimination by Enacting Proposal 2

On November 7, 2006, the voters of Michigan reaffirmed their commitment to the principles of racial equality and nondiscrimination by adopting the Michigan Civil Rights Initiative, by 57.9% of the vote. App. A-8. This measure, which adds Article I, Section 26, to the Michigan Constitution, prohibits the State of Michigan and its political subdivisions, including universities, colleges, and school districts, from discriminating against or granting preferential

treatment to any individual or group on the basis of race, sex, ethnicity, color, or national origin in public contracting, public education, and public employment. The initiative appeared on the ballot as Proposal 06-2, commonly referred to as Proposal 2 (Proposal 2 or Section 26). The full text of Article I, Section 26, is set out at App. E. The measure became effective on December 23, 2006.

Proposal 2 was drafted and sponsored by Petitioners, the Michigan Civil Rights Initiative Committee (MCRIC) and the American Civil Rights Foundation (ACRF). Proposal 2 was the voters of Michigan's response to this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003), which allowed the University of Michigan to grant preferences to African American, Hispanic, and Native American applicants in its admissions decisions.

Petitioners MCRIC and ACRF were at the forefront of the protracted campaign to adopt Proposal 2. The Sixth Circuit decision describes their significant interest in this lawsuit, in part, as follows:

> The MCRI[C], headed by Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 [] (2003), is registered with the Michigan Secretary of State as the official ballot-question committee for Proposal 2 . . . . The ACRF is a public-interest corporation dedicated to eradicating sex and race preferences throughout the United States . . . . The MCRI[C] and ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006 general election ballot and to

> see that the Michigan voters approved Proposal 2. The district court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts."

App. A-14.

Proposal 2 was highly controversial and efforts to get it onto the ballot involved three pre-ballot lawsuits in state and federal courts. In *Coal. to Defend Affirmative Action & Integration & Fight for Equality By Any Means Necessary (BAMN) v. Bd. of State Canvassers*, 686 N.W.2d 287 (Mich. Ct. App. 2004), BAMN challenged the Board of State Canvassers' approval of the form of the petition. In *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 708 N.W.2d 139 (Mich. Ct. App. 2005), MCRIC challenged the Board of State Canvassers' failure to certify the initiative petitions for placement on the November, 2006, ballot. In *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), Ward Connerly and Jennifer Gratz, members of ACRF and MCRIC, among others, were named defendants in a challenge to the placement of Proposal 2 on the general election ballot. Many of the same plaintiffs in these pre-ballot lawsuits are plaintiffs in the case at bar's post-ballot challenge to Proposal 2 on constitutional grounds. As noted by the Sixth Circuit, MCRIC and ACRF were "instrumental in Proposal 2's path to the ballot and ultimate approval." App. A-18.

B. The Legality of Proposal 2 Is Immediately Challenged in Federal Court, with Ideological Opponents of the Measure Named as Both Plaintiffs and Defendants

The day after the election, the constitutionality of Proposal 2 was challenged in federal court by many of the same plaintiffs, including BAMN, who were involved in the pre-ballot litigation. The lawsuit named as defendants (many of whom are the same elected officials who opposed Proposal 2) including: Jennifer Granholm, the Governor of Michigan; Regents of the University of Michigan; the Board of Trustees of Michigan State University; and the Board of Governors of Wayne State University.[1] The lawsuit seeks declaratory judgment that Proposal 2 is unconstitutional under the First and Fourteenth Amendments, in violation of Titles VI, VII, and IX of the Civil Rights Act of 1964, and Executive Order 11246, and for a preliminary and permanent injunction against its enforcement.

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[1] On November 8, 2006, Mary Sue Coleman, the President of the University of Michigan, gave a public address vowing to "do whatever it takes" to maintain the same number of underrepresented racial minorities at the university that were admitted when they were allowed to consider race directly in admission decisions. *See, e.g.*, Steve Chapman, *University of Michigan v. the People*, Chicago Tribune, Nov. 23, 2006, at 19 ("Her message was that the school would do 'whatever it takes' to delay, frustrate and circumvent the clearly expressed will of the public."). Governor Granholm opposed Proposal 2 during the campaign. App. B-17; *see also*, http://www.michigan.gov/som/0,1607,7-192-155904-,00.html (last visited Mar. 5, 2008) ("I am sad and disappointed voters said yes to Proposal 2.").

On December 11, 2006, the University Defendants filed a cross claim against Governor Granholm seeking a preliminary injunction permitting them to continue using existing admissions and financial aid through the end of their current cycle and filed a motion for preliminary injunction.[2] App. B-4. That same day, Governor Granholm formally requested the Attorney General to provide her with legal representation in the lawsuit. *Id.* The Attorney General created a conflict wall recognizing a potential legal conflict because of differing political positions taken on Proposal 2 during the preelection campaign.

Two days later, the plaintiffs filed a Certificate of Service showing service of the complaint on Governor Granholm was accomplished.

The next day, on December 14, 2006, MCRIC and ACRF filed their motion to intervene under Federal Rule of Civil Procedure, Rule 24, along with a motion to dismiss the complaint under Rule 12(b)(6). They sought intervention in this lawsuit as drafters and sponsors of Proposal 2 and on behalf of their individual members, some of whom are Michigan citizens, residents, and taxpayers who will be subject to, and will expect the State to comply with, the mandates of equal treatment and equal opportunity embodied within Section 26. On that same day, Attorney General Michael Cox filed his motion to intervene purportedly claiming to represent the People of Michigan. App. B-5. The Attorney General's motion was granted that same day and the district court ordered him to file his answer to the University

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[2] The cross-claim was dismissed with prejudice. App. B-5.

Defendants' motion for preliminary injunction on or before December 18, 2006. *Id.*

While waiting for the district court to rule on their motion to intervene, MCRIC and ACRF filed an opposition to the University Defendants' motion for preliminary injunction on December 18, 2006, and on December 19, 2006, they filed a request to expedite the hearing on their motion to intervene.

Unknown to MCRIC and ACRF, on December 18, 2006, the parties to the lawsuit along with the Attorney General entered into a stipulation consenting to an injunction suspending enforcement of Proposal 2 as it relates to the University Defendants and stipulating to the dismissal of the Universities' cross-claim. *Id.*

Also unknown to MCRIC and ACRF, on December 19, 2006, without a hearing and without a determination of the likelihood of success on the merits or any consideration of the public interest, the district court enjoined Proposal 2, consistent with the parties' stipulation, as it relates to the University Defendants' current admissions and financial aid cycles until July 1, 2007. The district court found that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation."

C. The District Court Denies Petitioners' Motion to Intervene

It was not until December 27, 2006, that the district court denied MCRIC's and ACRF's motion to intervene as of right and by permission. The lower court recognized that "whether these organizations

[MCRIC and ACRF] have a sufficient interest in the outcome of this litigation is perhaps a close one." App. at B-14.

Nonetheless, the court found the Petitioners' motion to intervene was not timely, that they lacked substantial legal interest in the litigation, and that the Michigan Attorney General would adequately represent their interests. App. B-17, 18.

D. A Sharply Divided Sixth Circuit Panel Affirmed the District Court Holding That the Drafters and Sponsors of Proposal 2 Lacked a Substantial Legal Interest to Defend its Constitutionality in a Post-Election Challenge

On December 29, 2006, MCRIC and ACRF requested an expedited appeal of the order denying their motion to intervene. The Sixth Circuit granted their motion on January 9, 2007. On September 6, 2007, the Sixth Circuit affirmed the lower court finding that once the initiative is adopted, MCRIC and ACRF no longer have a substantial legal interest—but just a general ideological interest in seeing Proposal 2 defended and enforced, which is shared by the entire Michigan citizenry. App. A-19. Although the defendants in the underlying action are elected officials who opposed Proposal 2 prior to adoption and an intervening Attorney General who is an elected official that entered into a stipulation to enjoin Proposal 2, the Sixth Circuit said that it was the state's responsibility to enforce and defend the new law.

The dissent found that MCRIC and ACRF have a substantial legal interest and easily meet the other Rule 24(a) factors:

> When the government has passed a law, it can be trusted to administer it. When, as here, however, government did not pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28 (Kennedy, C.J., concurring in part and dissenting in part). Although the majority opinion did not address the remaining intervention as-of-right elements, App. A-22, the dissent found that

> (1) the district court abused its discretion when it determined that the motion to intervene was not timely, (2) the ability of MCRIC and ACRF to protect its substantial legal interest may be impaired in the absence of intervention, and (3) that the Attorney General, as well as the other parties in the case, might not adequately represent that interest.

App. A-30 (Kennedy, C.J., concurring in part and dissenting in part).

Although MCRIC and ACRF were denied intervention, they continue to defend Section 26 as amici curiae. They filed an amicus brief in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006), and in the federal district court to support motions to dismiss and/or for summary judgment on January 18, 2008. Although the plaintiffs opposed their intervention, Ward Connerly of ACRF and Jennifer Gratz of MCRIC have been deposed and were required to produce documents.

Judgment was entered on September 6, 2007. On December 17, 2007, the petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Proposal 2, the Michigan Civil Rights Initiative, was a highly contentious citizen initiative to prohibit the state and its political subdivisions from using race and sex in public contracting, public education, and public employment. Many of the same plaintiffs and their attorneys appeared in both the pre- and post-election challenges to the initiative. *Compare Operation King's Dream*, 501 F.3d 584, with this post-election challenge. Although the plaintiffs who opposed the citizen initiative in the pre-election challenges are allowed to file and prosecute post-election challenges, the measure's drafters and sponsors may be heard only by intervening in post-election lawsuits.

In the decision below, the Sixth Circuit affirmed the denial of intervention as of right under Rule 24(a)(2), denying the drafters and sponsors of Proposal 2 any opportunity to defend their initiative, even though the court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." Apps. A-15 & B-14. The lower court reasoned that once the initiative had been approved by the voters, the measure's drafters and sponsors have only a "generic interest" in its defense against legal attack. The defense and enforcement of Proposal 2 must be

"entrusted" to elected state officials, even if those very officials had vigorously opposed the philosophy and objectives of the initiative during the campaign.

In contrast, the dissent recognized that the decision below rested on precedent that "altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Moreover, the dissent noted that the majority's confidence that public officials can be "entrusted" with the defense of initiatives they oppose was misplaced.

> When the government has passed a law, it can be trusted to administer it. When, as here, however, a government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28. The dissent reasoned:

> [I]t follows that *some* representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in [*Wash. State Bldg. & Constr. Trades Council, AFL-CIO v.*] *Spellman*, [684 F. 2d 627 (9th Cir. 1982)] that the sponsor of the measure should be that representative.

App. A-29.

This case squarely raises the important, recurring question of whether drafters and sponsors of ballot initiatives who have expended time and money in supporting and defending their initiatives in the pre-

election arena, should be permitted under Rule 24(a)(2) to defend their newly-adopted laws when they are challenged in post-election lawsuits. Other circuits permit drafters and sponsors to intervene as of right in actions challenging the laws they worked so hard to bring into existence. In the decision below, the Sixth Circuit comes into conflict with decisions of the Ninth Circuit and other courts, in ruling that upon passage of a ballot initiative, the measure's drafters and sponsors have no greater interest in defending the validity of the newly adopted law than the general public, and are not entitled as a matter of right to intervene in an action challenging the legality of the measure.

If the opinion below is allowed to stand, it will have a chilling impact on citizens' use of the initiative process as a mode of political expression. For this reason, and because the Federal Circuit Courts of Appeals are hopelessly divided on whether the drafters and sponsors of ballot initiatives have a substantial legal interest sufficient to support intervention as a matter of right, this Court should grant the Petition and establish doctrinal uniformity on this crucial issue.

I

THERE IS A DIRECT CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUITS ON WHETHER THE SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a)

This Court has rarely considered what type of interest applicants must show to intervene as of right under Rule 24(a)(2), since the Court amended the provision in 1966. Given the lack of guidance from this

Court, the primary responsibility for interpreting the requisite interest has fallen to the lower courts. Unsurprisingly, however, the advisory committee notes and a "paucity of [this Court's] decision[s] on intervention of right have resulted in widely varying interpretations of the Rule 24(a) requirements." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. Chi. L. Rev. 279, 283 (1990); *accord*, Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 416 ("[T]he federal judiciary has experienced considerable difficulty in delineating exactly what applicants must demonstrate to intervene of right."). This case raises an important and recurring question of whether sponsors of a popular initiative have an interest in the outcome of litigation challenging the measure's constitutionality that is sufficient to allow the group to intervene in such litigation as a matter of right. Attempting to resolve this question has led to a sharp split between the Sixth and Ninth Circuit Courts of Appeals.

Rule 24(a)(2) provides that intervention of right shall be granted to anyone who

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In evaluating these criteria, the Sixth Circuit recognizes that intervention as of right must be granted if a proposed intervenor establishes four elements: (1) the motion to intervene is timely; (2) the intervenor has a substantial legal

interest in the subject matter of the case; (3) its ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent its interest. App. A-13 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)). The Sixth Circuit also recognizes that Rule 24 "should be broadly construed in favor of potential intervenors." *Id.*

Yet, in applying these factors to the drafters and sponsors of Proposal 2, the Sixth Circuit found that Petitioners lacked an interest sufficient to warrant intervention in an action challenging the law that came into existence primarily because of their efforts. MCRIC's and ACRF's "status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2." App. A-18. The court opined that unless an initiative's sponsors are "regulated by the new law, . . . [they have] only a general ideological interest in the lawsuit." *Id.*

In sharp contrast, when the Ninth Circuit evaluated the criteria of Rule 24(a), that Circuit concluded that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of the measure it had sponsored. *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied sub nom., Don't Waste Wash. Legal Def. Found. v. Washington*, 461 U.S. 913 (1983). In *Spellman*, a challenge was brought against a Washington statute adopted by initiative that closed the borders of Washington to the entry of radioactive waste

originating outside the state. Don't Waste Washington (DWW), a public interest group that sponsored the challenged initiative, sought to intervene in the lawsuit challenging the new law. Although intervention of right was denied to DWW by the district court, the Ninth Circuit reversed, holding:

> Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a).

Id. at 629-30.

This was not an isolated ruling; rather, it embodies the well established precedent of the Ninth Circuit. For example, *Spellman* was cited with approval in *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). *Freeman* involved a suit by the States of Idaho and Arizona against the General Services Administration, challenging the procedures for ratification of the Equal Rights Amendment. The National Organization of Women (NOW) sought to intervene pursuant to Rule 24(a). The district court denied NOW's motion, but the Ninth Circuit reversed, holding that "NOW has such an interest in the continued vitality of ERA, which would as a practical matter be significantly impaired by an adverse decision and which is incompletely represented here." *Freeman*, 625 F.2d at 887.

Similarly, in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983), a public interest

group was found to have a substantial interest in defending the legality of a measure it had supported. *Id.* There the Audubon Society, which had supported the creation of a conservation area in Idaho, sought to intervene in an action challenging the federal statute that created that conservation area. *Id.* The Ninth Circuit held that the group had a protectable interest in defending the creation of the conservation area. "[A] public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *Id.* The court recognized that an adverse decision against the conservation area "would impair the society's interest in the preservation of birds and their habitats," an interest the conservation area was designed to protect. *Id.* at 528.

Until 2007, the Sixth Circuit was in accord with the Ninth Circuit and cited Ninth Circuit decisions for the proposition that a "public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). That changed when the Sixth Circuit handed down *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), *cert. denied sub nom., Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 128 S. Ct. 873 (2008). In that case, the Sixth Circuit found that an advocacy organization opposing abortion was not entitled to intervene as of right in an action challenging the constitutionality of legislation enacted by the Michigan Legislature. *Id.* at 327. To the majority below, this outcome "control[led]" its disposition of the present

case. App. A-15, 16. It is true, however, as the dissent below points out, that "the majority can only rely on *Northland Family Planning* because that case fundamentally altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Prior Sixth Circuit precedent was consistent in holding that "interest" was to be construed liberally and "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Id.* Nevertheless, the Sixth Circuit's current jurisprudence, as exemplified by *Northland Family Planning* and now the case at bar, is in irreconcilable conflict with the Ninth Circuit's precedent of *Spellman*, *Freeman*, and *Sagebrush Rebellion*.

The direct and dramatic conflict between the Sixth and Ninth Circuits over whether sponsors of popular initiatives are entitled to intervene as of right to defend those measures in post-election constitutional challenges is an issue of major national significance that can only be—and must be—resolved by this Court.

II

CONTRARY TO THE MAJORITY BELOW, ELECTED OFFICIALS CAN NOT BE PRESUMED TO ADEQUATELY REPRESENT THE INTERESTS OF THE SPONSORS OF PROPOSAL 2 FOR PURPOSES OF DENYING INTERVENTION UNDER RULE 24(a)

The initiative process exists to give the people an alternative means to express their political will when elected officials prove unable or unwilling to effectuate it. When the people of a state resort to the initiative

process to amend their state's constitution, this fact is prima facie evidence that the electorate lacks confidence in their elected representatives and public officials to adopt or apply the policies in question. Evidence of such a division between the expressed interests of the people and those of political office holders is especially compelling in cases like the one at bar, in which the state's top elected officials have aligned themselves *against* Proposal 2, despite its overwhelming support among the electorate.

A. Both the Majority and Dissent Below Recognized That the Substantiality of Petitioners' Legal Interest in This Litigation Is Closely Tied Up With Whether Michigan's Elected Officials Can Adequately Represent and Protect That Interest

The court below twice states that its ruling was limited to determining that Petitioners lacked the requisite substantial legal interest in the subject matter of this litigation to warrant intervention under Rule 24(a). App. A-13, 18. Yet, in fact this holding—and the contrary opinion of the dissent—is closely wrapped up with the question of whether elected officials who oppose a popular initiative can adequately represent the interests of the measure's sponsors, as is required by Rule 24(a), if those sponsors are to be denied intervention of right.

The majority below was confident that, "in a challenge to the constitutionality of an already-enacted statute . . . the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." App. A-17 (quoting *Northland*

Family Planning, 487 F.3d at 345). *Because* of the majority's sanguine view that matters of enforceability could be "entrusted for the most part to the government," Petitioners' interest in defending the constitutionality of Proposal 2 was found to be insufficiently substantial to merit intervention as of right. *Id.*

In contrast, the dissent below recognized that "the groups here have raised reasons why they cannot rely on the office of the Michigan Attorney General to vigorously advocate the constitutionality of Proposal 2." App. A-25. And *because* of this recognition that the state's officials cannot adequately represent Petitioners' interests, the dissent found that Petitioners have a substantial legal interest in defending the constitutionality of Proposal 2 sufficient to warrant intervention of right. App. A-30. The special place of the initiative process in our American democracy supports Judge Kennedy's dissent.

B. Popularly Enacted Initiatives Are Distinct from Laws Adopted Through the Legislative Process and When Such Citizen-Adopted Laws Are Challenged in Court, Elected Officials Cannot Be Presumed to Adequately Represent the Interests of the Drafters and Sponsors of Those Laws

Ordinarily, there is a presumption that when the government is a party to a lawsuit in its representative capacity, it will protect the interests of all citizens, including public interest groups. Vreeland, *supra*, at 284. But that presumption falters when a law is adopted by initiative—essentially a means of circumventing Legislatures and elected officials.

Initiatives are enacted because the mainstream political process has become unresponsive to the popular will. K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 833 (2006). No matter how disillusioned they may be with a state's political establishment, voters can reasonably rely upon an initiative's drafters and sponsors to defend the newly adopted law. When a successful initiative's sponsors are not allowed to intervene as of right to defend the measure's legality, the people no longer have a champion to uphold their exercise of the political process.[3] Any judge who disagrees with the political policies embodied in an initiative amendment can cripple the measure's chances of being upheld in court by blocking the initiative's sponsors from participating in its legal defense.

When sponsors of initiatives are not allowed to intervene in their defense as of right, there is a palpable risk that the newly adopted law will be emasculated by stipulated dispositions among the putatively—but not actually—adverse parties to a

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[3] Many initiatives center on public rights and their resolution will affect numerous individuals and entities. When there are legal challenges to initiatives after they have been adopted, these types of "public law cases usually involve high stakes and widespread impacts, their adjudication often 'call[s] for adequate representation in the proceedings of the range of interests that will be affected by them.' Public interest groups have been instrumental in filling this role." Vreeland, *supra*, at 280-81 (citation omitted). Further, unlike private disputes, remedies in these types of cases focus not just on the dispute between the parties, but on remedies that are forward looking and affect large numbers of people in society. Danielle R. Holley, *The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 Case W. Res. L. Rev. 103, 125 (2003).

legal challenge. "While one hopes that such backroom dealings are the rare exception, similar conflicts arise whenever the institution or counsel charged with defending a policy includes elements opposed to that policy." Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 316 (1999).

This risk is not diminished even if the particular individuals in office support the new law at the time a challenge is filed. Litigating the constitutionality of a popularly enacted initiative to a final appellate disposition in federal court can take years, and a change in office-holders while a lawsuit is pending can doom the measure if incoming officials oppose it on political grounds. This was implicitly recognized by the Ninth Circuit in *Sagebrush Rebellion*, a decision that rested in part on a change in the Department of Interior's political perspective and on the new Secretary's prior association with legal counsel for the opponents of the challenged measure. 713 F.2d at 528.

Thus, in determining the requisite interest to intervene as of right, the distinction between a law generated by elected officials and one adopted by the voters is a compelling one. Yet the court below dismissed the difference between mere lobbying for legislation and drafting, sponsoring, and enacting a popular initiative as "razor-thin," App. A-20 n.2. Relying on *Northland Family Planning*, the Sixth Circuit held that Petitioners lacked an adequate legal interest to intervene, because once the initiative that they drafted, supported, and defended became law, their interest was converted into "only a general ideological interest in seeing that Michigan enforces Proposal 2." App. A-19. In contrast, the dissent

recognized that there is a vital distinction between a legislatively enacted statute in which "the public interest in its enforceability is entrusted for the most part to the government," and an exercise of the initiative process whereby the "government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (*arguably because their elected officials would not accede to their will*)." App. A-28 (emphasis added) (Kennedy, C.J., concurring in part and dissenting in part).

C. Since Michigan's Elected Officials Cannot Adequately Represent Petitioners' Interest in Upholding the Constitutionality of Proposal 2, Petitioners Have a Substantial Legal Interest in Participating in the Defense of the Measure They Sponsored, and Should Be Granted Intervention as of Right

The burden of showing that the interests of an initiative's sponsors are not adequately represented by public officials already participating in the litigation should be minimal. Although this Court has not addressed the issue since the 1966 amendments, its prior position was clear: "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). This standard was historically in accord with Sixth Circuit precedent, which recognized that "[o]ne is not required to show that the representation will in fact be inadequate. For

example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247. A showing of *possibly* inadequate representation should be sufficient to meet this burden. *Linton v. Comm'r of Health & Env't, State of Tenn.*, 973 F.2d 1311, 1319 (6th Cir. 1992). Neither *Northland Family Planning* nor the decision below presents any compelling reason to *increase* this burden for sponsors of successful voter initiatives, such as Petitioners.

In the case at bar, Petitioners not only drafted Proposal 2, they were continually at the forefront of the protracted campaign to adopt the measure, defended it in pre-election litigation, and are committed to ensuring its constitutionality and timely implementation. Petitioner MCRIC was formed by the drafters, sponsors, and supporters of Proposal 2 to promote its adoption. It is registered with the Michigan Secretary of State as the official Ballot Question Committee for Proposal 2, for the purpose of reporting all campaign statements as required by Michigan law. Members of Petitioner ACRF helped draft, sponsor, and support Proposal 2. App. A-14, 15. As the Sixth Circuit recognizes, Proposal 2 "would not have reached the ballot without their efforts." App. A-15. Moreover, Petitioners have demonstrated a strong and continuing institutional interest in upholding and enforcing Proposal 2.

Both the district court and the Sixth Circuit found that the Michigan Attorney General, who was allowed to intervene in this action, will adequately represent the foregoing interests, thereby justifying the denial of Petitioners' application to intervene as of right. Yet

instead of vigorously defending the constitutionality of Section 26 and ensuring timely compliance with the law, the Attorney General promptly entered into a stipulation consenting to an injunction. This action shows his unwillingness to vigorously defend Proposal 2. Moreover, the Attorney General defended the district court's order enjoining Proposal 2 by filing a response in opposition to the emergency motion for stay pending appeal. The Attorney General argued "extensively about the hardships of complying with the law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d at 247.

This record demonstrates that Petitioners have a reasonable basis for their apprehension that Michigan's elected officials do not share and will not adequately represent their interest in vigorously defending the constitutionality of Proposal 2. And since, under the reasoning of both the majority and the dissent below, the adequacy with which Petitioners' interests will be represented effectively determines the substantiality of those interests for purposes of granting intervention under Rule 24(a), this Court should grant the Petition and establish a uniform rule of law granting intervention as of right to Petitioners and all similarly situated sponsors of popular initiatives.

III

IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE EXERCISE OF POLITICAL EXPRESSION VIA THE INITIATIVE PROCESS

This case turns on the significance of the initiative process as a crucial element in America's democratic political system. The vast majority of this country's political participation is channeled through the representative process, whereby voters elect legislators and other officials to implement the popular will. But the system does not work perfectly, and when significant divergences arise between the will of the people and the outcome of representative politics, nearly half of the states, including Michigan, have provided a "safety valve" of direct democracy.[4] This is the function and importance of the initiative process.

Sometimes referred to as the "fourth branch of government," the initiative process complements the representative system "by bringing government closer to the people and making Legislatures more accountable." Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 6-7. This exercise of direct democracy enables ordinary citizens to propose a law or constitutional amendment, place it on the ballot, and vote to adopt it, all without aid or interference by

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[4] Twenty-three states and the District of Columbia give their citizens some opportunity to bypass their Legislatures completely through citizen-initiatives and referendums. DuVivier, *supra*, at 833.

their Legislature. The initiative process may often be the last refuge of a disgruntled and disaffected electorate, since "initiatives are less encumbered by special interest influences than are representatives in state capitals." *Id.* at 7 (citing Thomas E. Cronin, *Direct Democracy: The Politics of the Initiative, Referendum and Recall* 8 (1989)). Probably for the same reason, "[p]olls consistently demonstrate that citizens like the initiative process *and trust its outcomes more than they trust legislation enacted by their representatives.*" Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. Cal. L. Rev. 299, 310 (2007) (emphasis added).

The use of the initiative process has surged in recent decades. John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 Colum. L. Rev. 1437, 1438 n.5 (2007) (between 1990 and November 2006, 680 initiatives appeared on state ballots). The subject matter of citizen initiatives is broad and often controversial.[5] About 40% of the measures pass, *id.* at 1443, whereupon they are commonly challenged in court on procedural and substantive grounds. *Id.* Typically, the plaintiffs in these challenges are the political and ideological opponents of the newly adopted initiatives, and the defendants are state officials charged with enforcing and defending the laws.

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[5] In November 2004, there were 162 statewide ballot propositions. These measures ranged from a constitutional amendment to ban gay marriage, to bond issues for stem cell research, to measures to legalize marijuana. John G. Matsusaka, *Direct Democracy Works*, 19 J. of Econ. Persp. 185 (2005).

Unfortunately, as a necessary corollary of the nature of the initiative process, elected state officials may have little stake in enforcing or defending popularly enacted initiatives that were adopted partly as an expression of dissatisfaction with the existing political establishment. Not infrequently—as is true in the case at bar—*both* the plaintiffs and defendants in post-election challenges may be political opponents of the new law. Under such circumstances, vigorous and capable defense of a challenged initiative is possible *only* if the measure's drafters and sponsors have the right to intervene in post-election litigation.

Foreclosing the sponsors of popular initiatives from intervention as of right to defend the measures they helped enact from attack by their opponents defeats the "safety valve" function of direct democracy. By turning over the defense of Proposal 2 to the very officials the voters sought to bypass, the decision below will have a profound chilling effect on the people's exercise of the initiative process as a form of political expression. The voters are intelligent enough to realize that "when state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability." Garrett & McCubbins, *supra*, at 309. The inescapable conclusion is that the voice of disaffected citizens will be excluded from the political process, just as it will be excluded from the federal courtroom.

The Ninth Circuit has recognized that the sound arguments in favor of allowing sponsors of citizen initiatives to intervene as of right are policy related,

and that allowing such intervention will have significant participatory externalities:[6]

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with *a practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 n.8 (9th Cir. 1995). The flip side of this coin is that a policy of *denying* intervention under Rule 24(a) deprives the citizen-supporters of initiatives of any voice in response to legal attacks by their ideological opponents—those who, by definition, could not command a majority at the polls. It is hard to imagine a more forceful repudiation of the democratic values the initiative process was designed to serve. At a time when America's democratic values are under

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[6] Even the granting of amicus status is insufficient in public law cases. Amicus status permits the public interest group a very limited role in the litigation. Amici do not participate in decree negotiations. More importantly, when a dispute centers on factual elements, "a party to the litigation is in a clearly superior position to insure that the range of issues and the evidence introduced in support of these issues conform to the viewpoint asserted by that party." Vreeland, *supra*, at 297 (citation omitted). Only parties to a suit have the opportunity to engage in discovery. *United States v. Stringfellow*, 783 F.2d 821, 828 (1986) ("[B]y engaging in independent discovery [the intervenor] might uncover facts that would affect the remedy in a manner favorable to it or would materially influence the settlement."). Here, although the drafters and supporters were denied intervention, they have been forced to submit to depositions and produce documents.

attack around the globe, a decision such as the one below, which can be expected to have a demoralizing and chilling effect on the use of democratic processes as a mode of political expression, cries out for review and redress by this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of certiorari.

DATED: March, 2008.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0362p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN), et al.,
Plaintiffs - Appellees,

Nos. 06-2653/2656

v.

JENNIFER GRANHOLM, et al.,
Defendants - Appellees,

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE; AMERICAN CIVIL RIGHTS FOUNDATION; TOWARD A FAIR MICHIGAN,
Proposed Intervenors - Appellants.

Appendix A–2

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Submitted: August 14, 2007

Decided and Filed: September 6, 2007

Before: KENNEDY, MARTIN, and COLE,
Circuit Judges.

COUNSEL

ON BRIEF: Sharon L. Browne, Alan W. Foutz, PACIFIC LEGAL FOUNDATION, Sacramento, California, Charles J. Cooper, Michael W. Kirk, COOPER & KIRK, Washington, D.C., Kerry L. Morgan, PENTIUK, COUVREUER & KOBILJAK Wyandotte, Michigan, Michael E. Rosman, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., for Appellants. Philip J. Kessler, BUTZEL LONG, Detroit, Michigan, Leonard M. Niehoff, BUTSEL LONG, Ann Arbor, Michigan, George B. Washington, SCHEFF & WASHINGTON, Detroit, Michigan, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, James E. Long, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

COLE, J,, delivered the opinion of the court, in which MARTIN, J., joined. KENNEDY, J. (pp. 10-13), delivered a separate opinion concurring in part and dissenting in part.

Appendix A–3

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U:S. COURTHOUSE
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Re: Case Nos. 06-2653; 06-2656
Coalition to Defend Affirmative Action, et al. v. Jennifer Granholm, et al.
District Court No. 06-15024

Dear Counsel:

Enclosed is a copy of a corrected page from the decision originally sent to you on September 6, 2007. Please make corrections in your publication version as indicated on page 1, counsel information.

Thank you for your cooperation in this matter.

Yours very truly,
Leonard Green, Clerk
By s/Linda K. Martin
(Mrs.) Linda K. Martin
Deputy Clerk

LKM/swh
Enclosure

cc: Honorable David M. Lawson
Mr. David J. Weaver, Cllerk
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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0362p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN), et al.,
Plaintiffs - Appellees,

Nos. 06-2653/2656

v.

JENNIFER GRANHOLM, et al.,
Defendants - Appellees,

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE; AMERICAN CIVIL RIGHTS FOUNDATION; TOWARD A FAIR MICHIGAN,
Proposed Intervenors - Appellants.

Appendix A–6

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Submitted: August 14, 2007

Decided and Filed: September 6, 2007

Before: KENNEDY, MARTIN, and COLE,
Circuit Judges.

COUNSEL

ON BRIEF: Sharon L. Browne, Alan W. Foutz, PACIFIC LEGAL FOUNDATION, Sacramento, California, Charles J. Cooper, Michael W. Kirk, COOPER & KIRK, Washington, D.C., Kerry L. Morgan, PENTIUK, COUVREUE & KOBILJAL, Wyandotte, Michigan, Michael E. Rosman, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., for Appellants. Philip J. Kessler, BUTZEL LONG, Detroit, Michigan, Leonard M. Niehoff, BUTSEL LONG, Ann Arbor, Michigan, George B. Washington, SCHEFF & WASHINGTON, Detroit, Michigan, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, James E. Long, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

COLE, J., delivered the opinion of the court, in which MARTIN, J., joined. KENNEDY, J. (pp. 10-13), delivered a separate opinion concurring in part and dissenting in part.

OPINION

R. GUY COLE, JR., Circuit Judge. Before us are two appeals challenging a district court's order denying intervention under Federal Rule of Civil Procedure 24(a) and (b) to (1) the Michigan Civil Rights Initiative committee (the "MCRI"), (2) the American Civil Rights Foundation (the "ACRF"), and (3) Toward a Fair Michigan's ("TAFM," collectively, the "proposed intervenors").[1] Each wishes to intervene in an action brought against (1) Jennifer Granholm, the Governor of Michigan, and (2) the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (collectively, the "Universities"), seeking to invalidate and permanently enjoin from enforcement a recently enacted amendment to Michigan's constitution that outlaws, among other things, sex- and race-based preferences in public education, public employment, and public contracting. Mich. Const., art. 1, § 26. The amendment was the result of the Michigan voters' approval, in November 2006, of Proposal 06-2 ("Proposal 2"), a statewide ballot initiative. For the following reasons, we AFFIRM the district court's denial of intervention to the proposed intervenors.

[1] The district court similarly denied the City of Lansing's attempt to intervene, and the City of Lansing also appealed. The City of Lansing, however, has since voluntarily dismissed its appeal. *See Coalition to Defend Affirmative Action v. Granholm*, No. 06-2658 (6th Cir. Aug. 8, 2007) (order).

I. BACKGROUND

From approximately July 2004 through December 2004, the MCRI, with the assistance of paid agents, solicited signatures in support of placing a statewide ballot initiative, which would later become Proposal 2, on Michigan's November 2006 general election ballot. *Operation King's Dream v. Connerly*, ___ F.3d ___, 2007 WL 2416815, at *1 (6th Cir. 2007). Proposal 2 has been characterized as "anti-affirmative action," *Operation King's Dream v. Connerly*, ___ F. Supp. ___, 2006 WL 2514115, at *1 (E.D. Mich. 2006), because, if approved, it would amend Michigan's constitution to prohibit the state from granting "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const., art. 1, § 26; *see also, e.g., Operation King's Dream*, 2006 WL 2514115, at *2-3. Indeed, Proposal 2's path to the ballot was not without controversy. *Operation King's Dream*, 2007 WL 2416815, at *6 ("By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes."). Nonetheless, on November 7, 2006, Michigan voters approved Proposal 2, with approximately 57.9% of voters favoring it. *See* State Proposal—06-2: Constitutional Amendment: Ban Affirmative Action Programs, at http://miboecfr.nictusa.com/election/results/06GEN/90000002.htm1 (last visited Aug. 11, 2007). After its approval, Proposal 2 was scheduled to go into effect on December 23, 2006. *See* Mich. Const. art. 12, § 2.

The day after the election, however, on November 8, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary, along with other organizations and individuals (collectively, the "Plaintiffs"), filed suit in the Eastern District of Michigan against Governor Granholm and the Universities, seeking a declaratory judgment that the amendment was invalid and a permanent injunction against its enforcement. "In their amended complaint, [P]laintiffs contended that Proposal 2 violates two federal constitutional provisions (the First and Fourteenth Amendments), three federal civil rights statutes (Title VI, Title VII[,] and Title IX)[,] and one presidential order (Executive Order 11246)." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 241 (6th Cir. 2006). And on December 11, the Universities filed a cross-claim against Governor Granholm, seeking a preliminary injunction permitting them to continue using their existing admissions and financial-aid policies through the end of the 2007 admissions cycle.

On December 14, three days after the Universities filed their cross-claim, the Michigan Attorney General, Michael Cox, moved to intervene in the lawsuit. That same day, the MCRI and the ACRF jointly moved to intervene as well. The district court ruled on only the Attorney General's motion, granting it that day.

On December 18, TAFM and Eric Russell, a white applicant to the University of Michigan Law School, jointly moved to intervene in the lawsuit. That same day, before the district court issued its ruling on the four pending intervention motions (the MCRI's, the

ACRF's, TAFM's, and Eric Russell's), the Plaintiffs in the underlying suit and the three sets of parties to the cross-claim filed a stipulation with the district court, which read in relevant part:

> It is hereby stipulated, by and between the parties that this Court may order as follows:
>
> (1) that the application of Const[.] 1963, art[.][1], § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;
>
> (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim [.]. . .

Coal. to Defend Affirmative Action, 473 F.3d at 242. On December 19, the district court entered a preliminary injunction, consistent with the parties' stipulation, enjoining the application of Proposal 2 to the Universities' admissions and financial-aid policies until July 1, 2007, and dismissed the Universities' cross-claim. *Coal. to Defend Affirmative Action v. Granholm*, No. 2:06-cv-15024-DML-RSW, slip op. at 3 (E.D. Mich. Dec. 19, 2006) (order).

Having received no response to their motions to intervene, on December 21, Eric Russell and TAFM filed a notice of appeal in this Court, and, the day after that, "they filed in this [C]ourt an 'Emergency Motion for a Stay Pending Appeal' of the district court's preliminary injunction and a Petition for a Writ of Mandamus directing the district court to grant their motion to intervene and to vacate its preliminary injunction." *Coal. to Defend Affirmative Action*, 473 F.3d at 242.

On December 27, 2006, the district court granted Eric Russell's motion to intervene but denied the MCRI's, the ACRF's, and TAFM's motions both as of right and by permission. *Coal. to Defend Affirmative Action v. Granholm*, No.2:06-cv-15024-DML-RSW (E.D. Mich. Dec. 27, 2006) (order). The next day, Eric Russell amended his "Emergency Motion for a Stay Pending Appeal," and the MCRI, the ACRF, and TAFM all appealed the denials of their motions to intervene.

On December 29, 2006, based on Eric Russell's "Emergency Motion for a Stay Pending Appeal," a panel of this Court stayed the district court's preliminary injunction pending appeal, allowing article I, section 26 of the Michigan Constitution to take immediate effect. *Coal. to Defend Affirmative Action*, 473 F.3d at 253. The merits appeal of the district court's preliminary injunction is still pending before this Court.

II. ANALYSIS

"This is but one piece of litigation spurred by the Proposal 2 saga." *Operation King's Dream*, 2007 WL 2416815, at * 1. Today, we address only the appeals of the district court's order denying intervention as of right and by permission to the MCRI, the ACRF, and TAFM. As discussed more fully below, because none of the proposed intervenors have a substantial legal interest in the subject matter of the case, the district court properly denied their motions for intervention as of right. Further, the district court acted within its discretion when it denied them permissive intervention. Fed. R. Civ. P. 24(b).

A. Intervention as of Right

Rule 24(a) of the Federal Rules of Civil Procedure entitles certain parties to intervene in a lawsuit as of right:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). We have explained that a proposed intervenor must establish four factors before being entitled to intervene: (1) the motion to intervene

is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest maybe impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest. *Gruffer v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir, 1999). Acknowledging that Rule 24 should be "broadly construed in favor of potential intervenors," *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991), the district court nevertheless held that none of the proposed intervenors met any of the four factors.

"We review de novo motions to intervene as of right, except for the timeliness element, which is reviewed for an abuse of discretion." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 244 (6th Cir. 2007) (citing *Grutter*, 188 F.3d at 98). A district court abuses its discretion only when we are "left with the definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where the trial court improperly applies the law or uses an erroneous legal standard." *Paschal v. Flagstar Bank*, 295 F.3d 565, 576 (6th Cir. 2002) (citations, alterations, and internal quotation marks omitted).

We begin by addressing whether the proposed intervenors have a substantial legal interest in the litigation. Because we conclude that none do, we need not address the remaining factors. *See, e.g., Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989) ("[A] failure to meet [any] one of the [four factors] will require that the motion be denied.").

1. *Substantial Legal Interest*

"The proposed intervenors must show that they have a substantial interest in the subject matter of this litigation." *Grutter*, 188 F.3d at 398 (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 341. (6th Cir. 1990)). Although we have noted that this Circuit "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), this does not mean that any articulated interest will do. *See, e.g., Northland Family Planning*, 487 F.3d at 244; *accord Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) ("[T]his does not mean that Rule 24 poses no barrier to intervention at all."). Of course, establishing a substantial legal interest "is necessarily fact-specific." *Miller*, 103 F.3d at 1245.

a. *The MCRI and the ACRF*

According to the MCRI and the ACRF, "they were at the forefront of the protracted campaign to adopt Proposal 2 and are committed to ensuring its constitutionality and timely implementation." The MCRI, headed by Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 (2003), is registered with the Michigan Secretary of State as the official ballot-question committee for Proposal 2, and was, by all accounts, the driving force behind the controversial solicitation of signatures necessary to place Proposal 2 on the ballot. *See Operation King's Dream*, 2007 WL 2416815, at *2. The ACRF is a public-interest corporation dedicated to eradicating sex and race preferences throughout the United States. Ward Connerly, an ACRF board member, was instrumental

in the passage of Proposition 209 in California, which similarly banned "preferential treatment to, any individual or group an the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Coal. for Economic Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) (quoting Cal. Const. art 1, § 31(a)). Indeed, by design, Proposal 2 tracks the language of Proposition 209. The MCRI and the ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006 general election ballot and to see that the Michigan voters approved Proposal 2. The district court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." *Coal. to Defend Affirmative Action*, slip op. at 11.

Both the MCRI and the ACRF argue that as groups substantially involved in the process leading to the adoption of the challenged amendment, they have a legal interest in the subject matter of this lawsuit. They rely primarily an our decisions in *Grutter* and *Miller*, as well as several Ninth Circuit decisions that we have cited favorably. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). We, however, conclude that our precedent requires a contrary conclusion. Since the district court denied the proposed intervenors motions back in December, we decided *Northland Family Planning*, which is directly on point and controls our disposition.

In *Northland Family Planning*, six health-care facilities and four physicians filed suit against various Michigan officials, seeking to invalidate and enjoin the enforcement of the Legal Birth Definition Act, which "prohibit[ed] the practice colloquially referred to as partial-birth abortions." 487 F.3d at 327-28. Like Proposal 2, the Legal Birth Definition Act became law after a successful proposal by a citizen initiative petition. *Id.* at 327. Prior to the district court holding the Act unconstitutional (which we affirmed), a group called "Stand Together to Oppose Partial-Birth-Abortion" ("STTOP") moved to intervene in the litigation under Federal Rule of Civil Procedure 24(a) and (b). *Id.* at 328. Similar to the MCRI and the ACRF, "STTOP is a ballot-question committee, which was formed to promote the passage and continued viability of the Legal Birth Definition Act." *Id.* at 328, 344. The district court denied STTOP's motion to intervene, and we affirmed. *Id.* at 343-46.

In affirming the denial of STTOP's motion to intervene, we held that an organization involved in the process leading to the adoption of a challenged law, does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, unless the challenged law regulates the organization or its members. *Id.* In so holding, we drew a distinction between cases involving challenges "to the *procedure* required to pass a particular rule, as opposed to the government's subsequent *enforcement* of the rule after its enactment." *Id.* at 345 (second emphasis added). In drawing this distinction, we explained that "the public at large—including public interest groups—has an interest in the procedure by which a given legal

requirement is enacted as a matter of democratic legislative process." *Id.* "(On the other hand," we further explained, "in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." *Id.*; *accord Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 316 (6th Cir. 2005) (affirming the denial of a motion to intervene as of right by a committee that existed to support the passage of a local referendum to amend a zoning ordinance). Thus, had STTOP sought to intervene in a suit challenging the legislative process by which the statute was enacted, then it likely would have had a substantial legal interest in the lawsuit due to its involvement in the passage of the statute. *Northland Family Planning*, 487 F.3d at 345-46. But, after that statute's enactment, STTOP's interest in a suit challenging the enforcement of the statute became insubstantial "due to the state's responsibilities in enforcing and defending it as it is written." *Id.* at 346.

Like STTOP's relationship to the Legal Birth Definition Act, the MCRI was created and continues to exist for the purpose of passing and upholding Proposal 2. *See id.* at 345. The ACRF's goals are, of course, more national, but for the purposes of this case, its relationship to Proposal 2 and interest in the underlying litigation is identical to the MCRI's. That is, like STTOP, their "legal interest can be said to be limited to the passage of [Propasal 2] rather than the state's subsequent implementation and enforcement of it." *Id.* No doubt, each group was instrumental in

Proposal 2 's path to the ballot and ultimate approval. Their interest in seeing Proposal 2 enforced, however, "is greatly diminished due to the state's responsibilities in enforcing and defending [Proposal 2] as written." *Id.* at 346. Therefore, *Northland Family Planning* compels us to hold that the MCRI's and the ACRF's status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2.

This is not to say that all organizations that advocate for the passage of a law lack a substantial legal interest in a suit challenging the government's subsequent enforcement of that law. Indeed, we have held that where a group is "regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted." *Id.* at 345; *accord, e.g., Grutter*, 188 F.3d at 401(holding that proposed intervenors, who were applicants to the University of Michigan, had a substantial legal interest in the school's admissions process); *Miller*, 103 F.3d at 1247 (holding that the Michigan Chamber of Commerce had a substantial legal interest where it was regulated by at least three of the four statutory provisions challenged by plaintiffs). Where, however, an organization has only a general ideological interest in the lawsuit like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial. *See Northland Family Planning*,

487 F.3d at 346 (explaining that an organization's interest pertaining only to enforceability of a statute in general is not cognizable as a substantial legal interest without the statute also regulating the organization or its members).

Here, the MCRI and the ACRF have only a general ideological interest in seeing that Michigan enforces Proposal 2. Each group asserts that its mission to enforce civil-rights laws at all levels of government will be impeded if not granted intervention. To be sure, neither the MCRI nor the ACRF maintains that it or its members are specifically regulated by those portions of Michigan's constitution amended by Proposal 2. The most they claim is that Proposal 2 naturally affects them because each group has at least a few members that are Michigan residents. This, however, amounts to only a generic interest shared by the entire Michigan citizenry. An "interest so generalized will not support a claim for intervention as of right." *Miller*, 103 F.3d at 1246 (quoting and citing with approval *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364 (11th Cir. 1982)). Thus, the MCRI's and the ACRF's cognizable legal interests extend only to suits challenging the legislative process by which Proposal 2 was approved. At this point, the MCRI's and the ACRF's interest in the underlying litigation "simply pertains to the enforceability of (Proposal 2] in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right."[2]

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[2] The dissent attempts to differentiate a citizen-initiated legislative enactment from a citizen-initiated amendment to a state's constitution, arguing that a public interest group may have

(continued...)

Northland Family Planning, 487 F.3d at 346. As we aptly explained in *Northland Family Planning*, "[w]ithout these sorts of limitations of the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process." *Id.*

The MCRI and the ACRF point out, however, that in Grutter we reversed a district court's denial of intervention as of right to the Citizens for Affirmative Action's Preservation ("CAAP"), "a nonprofit organization whose stated mission was to preserve the opportunities in higher education for African-American and Latino/a students in Michigan." 188 F.3d at 397. In *Grutter*, we held that CAAP had a substantial legal interest in a lawsuit challenging the constitutionality of the University of Michigan's race-conscience admissions policy. *Id.* at 398-99. The MCRI and the ACRF contend that CAAP, like them, had only an ideological interest in the lawsuit, and because CAAP was granted intervention as of right, they should be too.

The MCRI and the ACRF misidentify CAAP's interest in Grutter. Although CAAP certainly had a

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[2] (...continued)
a substantial legal interest in the latter's enforcement. Dissent Op. at 3-4. We are not persuaded by this razor-thin distinction. Regardless how a law came into being, the government is, for the most part, entrusted with enforcing it. Thus, as we stated in *Northland Family Planning*, the public's legal interest does not extend to suits challenging the enforceability of an already-enacted law. 487 F.3d at 345. So, where, as here, a public interest group has only an ideological stake in the litigation, it too cannot be said to have a substantial legal interest in the law's enforcement.

general ideological aversion to the elimination of the University of Michigan's race-conscience admissions policy, its members were also directly affected by the challenged policy. At the time of the litigation, CAAP was a coalition consisting of minority students and civil-rights groups, among others, premised on preserving affirmative action in higher education. Indeed, consistent with the makeup of its members, the district court treated CAAP's interests as identical to the proposed minority-student intervenors in that lawsuit, who, like Eric Russell, no doubt had a substantial legal interest in the litigation. *See Gratz v. Bollinger*, 183 F.R.D. 209, 212 n.4 (E,D. Mich. 1998), *rev'd by Grutter*, 188 F.3d 394 ("[I]t would appear that the proposed student intervenors and [CAAP] share the same interest in the preservation of race as a factor in determining admissions. . . , [T]he Court will discuss the interests of both groups together." (internal citation and quotation marks omitted)). Moreover, CAAP was clear in its intervention motion that its members would be directly affected by the outcome of the litigation. *See id.* ("CAAP asserts that its membership consists of individuals, some of whom are parents or grandparents of prospective African-American and Latino students in the State of Michigan."). Consistent with this, in *Grutter*, we held that CAAP, by virtue of its minority members, "enunciated a specific interest in the subject matter of th[e] case, namely [its] interest in gaining admission to the University of Michigan. . . ." 188 F.3d at 399. Here, the MCRI and the ACRF have made no such specific "enunciation."

Thus, we hold that the MCRI and the ACRF lack a substantial legal interest in the outcome of this case

and affirm the district court's denial of their joint motion to intervene as of right. Accordingly, as mentioned, we need not address the remaining intervention-as-of--right elements.

b. *TAFM*

TAFM's contention that it is entitled to intervene as of right is even less compelling. We have little trouble concluding that TAFM is without a substantial legal interest in the outcome of this case. TAFM took no position in favor or against Proposal 2 before, during, or after the November 2006 election, and instead sought only to "promote an educated decision on the question by Michigan citizens through civil and informed discourse." By all accounts, neither TAFM nor its members are regulated by the challenged constitutional amendment. At best, TAFM has only an ideological interest in seeing that Proposal 2 is enforced. As discussed above, consistent with our holding in *Northland Family Planning*, this alone does not constitute a substantial legal interest. *See* 487 F.3d at 346. Therefore, the district court also properly denied TAFM's motion to intervene as of right.

B. Permissive Intervention

Under Rule 24(b) of the Federal Rules of Civil Procedure, a district court may grant intervention to certain interested parties:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in

> common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). "The denial of permissive intervention should be reversed only for clear abuse of discretion by the trial judge." *Purnell*, 925 F.2d at 951 (citing *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161 (6th Cir.1987)).

In denying the proposed intervenors permissive intervention, the district court explained that, "in cases of this importance, [the district courts] are mere way stations on the judicial road to resolution by courts beyond," and that granting intervention to the proposed intervenors "will inhibit, not promote, a prompt resolution . . . ." *Coal. to Defend Affirmative Action*, slip op. at 16. The district court expressed further concern that the proposed intervenors would "seek to file more claims, amend pleadings even further, and inject issues that may not lead directly to a resolution of the issues circumscribed by the present pleadings." *Id.* This, coupled with the district court's conclusions that the proposed intervenors lacked a substantial legal interest in the lawsuit, and that the proposed intervenors were adequately represented by existing parties, was a sufficient analysis of the relevant criteria required by Rule 24(b). We cannot say that we are "left with a definite and firm conviction," *Paschal*, 295 F.3d at 576, that the district court acted outside its discretion when it denied permissive intervention to the MCRI, the ACRF, and TAFM. *Cf. Miller*, 103 F.3d at 1248 ("[The district

court must] provide enough of an explanation for its decision to enable this court to conduct meaningful review. It is insufficient merely to quote the rule and to state the result.").

III. CONCLUSION

For these reasons, we **AFFIRM**.

CONCURRING IN PART, DISSENTING IN PART

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's disposition with regard to appellant TAFM. I cannot, however, agree that *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007), "compels us to hold that the MCRI's and the ACRF's status . . . is insufficient to provide them with a substantial legal interest" in this case. Maj. Op., *ante* at 6. The majority relies on that opinion to avoid clear prior holdings from both our circuit and the Ninth Circuit (whose holdings we had previously adopted). Therefore, because I conclude that MCRI and ACRF have a substantial legal interest (and easily meet the other Rule 24(a) factors), I dissent.

I. Substantial Legal Interest

The majority relies almost solely on *Northland Family Planning*; indeed, it concludes that case "compels" its holding here. Maj. Op. at 6. *Northland Family Planning* is distinguishable because (1) the challenged state law in that case was enacted by the legislature, rather than by the citizens through constitutional amendment as here, and (2) the groups here have raised reasons why they cannot rely on the office of the Michigan Attorney General to vigorously advocate the constitutionality of Proposal 2.

At the outset, however, I would note that the majority can only rely on *Northland Family Planning* because that case fundamentally altered the Rule 24(a) landscape. Prior precedent was consistent in holding that "interest" was to be construed liberally and "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245, 1247 (6th Cir. 1997). While *Northland Family Planning* carefully distinguished our and some of the Ninth Circuit's prior holdings or their facts, it ignored the basis for those holdings.[3]

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[3] In addition, the intervention discussion may well be dicta. The district court in *Northland Family Planning* denied the State of Michigan's motion to dismiss and ruled that the state statute was unconstitutional. In the same order, it denied the public interest group's motion to intervene as a defendant. We affirmed the ruling that the statute was unconstitutional, granting summary judgment to the plaintiffs. We also noted that, "[t]he finality of the summary judgment decision clearly has potential to render moot [the group's] motion to intervene" 487 F.3d at 344. Nonetheless, we addressed the question. Because the grant of

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In *Miller* we cited with approval a Ninth Circuit rule that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Id.* That rule found its genesis in a case that cannot be distinguished from *Northland Family Planning.* In *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*, a voter approved initiative "prohibit[ed] the transportation and storage within [the state] of radioactive waste produced outside the state." 684 F.2d 627, 629 (9th Cir. 1982). The legislature of the state subsequently enacted legislation pursuant to the initiative. In a lawsuit against the state challenging the constitutionality of the statute, the citizen-group sponsor of the legislation moved to intervene, but the district court denied its motion. The Ninth Circuit reversed the district court and held that the appellant, "as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." *Id.* at 630. The public interest group was not regulated by the initiative, which the majority concludes is critical here, Maj. Op. *ante* at 6-7, nor was it involved in serial litigation concerning the initiative, which *Northland Family Planning* found was important in *Miller.* 487 F.3d at 344-45. Nonetheless, and despite consistent citation with approval to the line of Ninth

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[3] (...continued)
summary judgment to plaintiffs ended the case on the merits, there was no need to determine whether the public interest group had the right to intervene. For this reason, future panels may reject the Rule 24(a) discussion in *Northland Family Planning.* Indeed, without that foundation, the decided break with prior precedent may very well convince subsequent panels to conclude that this case too is anomalous, and they need not follow it when reflecting on the body of Rule 24(a) case law in this circuit.

Circuit cases beginning with *Spellman*, a panel of this court reached the opposite conclusion in *Northland Family Planning*.

There are good reasons to conclude, however, that the sponsors of a constitutional amendment, like Proposal 2 in this case, have a greater interest in defending the measure than the group that sought to intervene in *Northland Family Planning*.[4] There we noted that "in a challenge to the constitutionality of an already enacted statute . . . the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the *legislative* process becomes less relevant." 487 F.3d at 345 (emphasis mine). That insight rests on a simple

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[4] An elaboration of the facts of *Northland Family Planning* and the Michigan initiative and constitutional amendment procedures is in order: In Michigan, a group can propose laws to the legislature through an initiative.

> To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required . . . . Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment . . . . If any law so proposed is not enacted by the legislature within 40 days, [it] shall [be] submit[ted] to the people for approval or rejection at the next general election.

Mich. Const. Art. II § 9. In *Northland Family Planning*, the proposed intervenor had proposed the challenged law to the legislature through an initiative and the legislature had enacted the law. In contrast, in the instant case, a majority Michigan voters approved an amendment to the Michigan Constitution in a general election pursuant to Mich. Const. Art. 12 § 2.

presumption: When the government has passed a law, it can be trusted to administer it. When, as here, however, government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

The procedural history of this case confirms that the plaintiffs have a basis for their fear that the office of the Attorney General cannot be relied on to defend "the public interest in [this amendment's] enforceability." *Id.* As the majority notes, the Attorney General and the Governor have already compromised with the plaintiffs and the cross-claimants in this case and stipulated to an injunction that, we have previously found, had no basis in federal law. Maj. Op. *ante* at 3-4; *Coalition v. Granholm*, 473 F.3d 237, 244-247 (6th Cir. 2006). In addition the "government" in this case is divided; prior to the 2006 general election, the Attorney General publicly supported Proposal 2 and the Governor opposed it. Therefore, while the Attorney General takes the view in his filings that the amendment does not violate the federal Constitution, the Governor has indicated a possibility that she might conclude otherwise. Indeed, although she was sued in her official capacity only, she has requested that the Attorney General put a conflict wall in place in his office to ensure that her position is represented in federal court without the influence of the Attorney General. Governor's Br. at 4-5, No. 06-2656. The Governor and the Attorney General have both filed answers in the district court and, by all appearances, intend to litigate the matter separately.

Therefore, the State of Michigan (the only appropriate defendant in an action to declare a measure adopted in a general election unconstitutional) does not appear to be a party in this case. Instead, Attorney General Cox and Governor Granholm are both either named defendants or, in the case of Attorney General Cox, an intervening defendant because they have recognized potential for conflicting views (and thus different litigation strategies) between them. It is also unclear what the status of Governor Granholm, as a party, actually is. After Attorney General Cox intervened, she should no longer have been in the case, yet she has continued to file briefs here in support of the denial of intervention, as well as pleadings and briefs in the court below.

All of this reinforces concern with entrusting the "public interest in enforceability" of a general election, voter-approved measure to elected officials. As the example of the Governor proves, there are cases in which the elected officials of a state will disagree with the majority of the voting population on a particular point of public policy. Therefore, when the voters demonstrate their preference on that point of public policy through the constitutional amendment process, it follows that some representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in *Spellman* that the sponsor of the measure should be that representative.

The point, therefore, is simply that measures approved by the voting public in a general election are different from legislative acts. This point does not depend on the policy preferences of particular elected

officials. Rather, the possibility of conflict creates a substantial interest. It does not matter in the substantial interest inquiry that the Attorney General supported Proposal 2 before the election. That fact will be weighed in consideration of the last factor, namely whether a party already in the case will sufficiently represent the position of the proposed intervenor. I turn to that factor, as well as the other remaining ones, presently.

II. Remaining factors

Because it concludes that MCRI and ACRF do not have a substantial legal interest in this case, the majority does not address the remaining factors. I would find, however, that (1) the district court abused its discretion when it determined that the motion to intervene was not timely, (2) the ability of MCRI and ACRF to protect its substantial legal interest may be impaired in the absence of intervention, and (3) that the Attorney General, as well as the other parties in the case, might not adequately represent that interest.

First, the parties' motion to intervene was timely. While it is true that appellants must have known about the litigation shortly after it was filed, it is equally clear that the litigation had not progressed by the time they moved to intervene. "The absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important . . . circumstances" to consider. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000). The Attorney General stated in his motion to intervene, filed the very same day as appellants' and found to be timely, that "intervention will in no way

unduly delay or prejudice the adjudication of the rights of the original parties since this suit is in its initial phase." Attorney General's Mot. Interv. ¶ 17. Appellants waited only a week after service on the Governor and only one day after notice of that service was filed in the district court before filing their motion. No discovery had occurred and no orders had issued. None of the traditional hallmarks of a progressing litigation yet existed.

Second, to dispose of the present case without allowing the intervention of the MCRI and ACRF would compromise their ability to protect their interests, as an adverse ruling would threaten the viability of the constitutional amendment that these groups supported. To satisfy this element, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied[,]" a "burden [that] is minimal." *Miller*, 103 F.3d at 1247 (citing *Purnell u City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991)) (emphasis mine). As such, the appellants' showing that an adverse determination in this case has the potential to hinder their ability to protect their interest in eliminating race-based preferences is sufficient to support intervention.

Third, the Attorney General *might* not adequately represent the appellants' interest in this matter. The threshold for this requirement is again low; appellants need not show that representation *won't* be inadequate, only that the *potential* exists that the Attorney General will not make all of their arguments. *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999); *Sagebrush Rebellion, Inc, v. Watt*, 713 F.2d 525, 528

(9th Cir. 1983). The procedural history of this case indicates that this potentiality exists. While the opponents of the motion have argued that the stipulated injunction was merely a litigation strategy rather than a different theory of the case, the fact that this court overturned the stipulated injunction on appeal indicates that a more zealous litigation approach could significantly alter the enforcement and ultimately the interpretation of this constitutional amendment. In addition, the conflict wall set up across the Attorney General's office at the request of the Governor further indicates that different interpretations of this provision and its interaction with federal constitutional and statutory law are possible; the appellants' interpretation could be more expansive than that of the existing parties.

* * *

In order to ensure vigorous advocacy so that we do not intrude on states' interests in the constitutionality of their own laws, I would hold that sponsors of voter initiatives may intervene as of right to defend the measures they sponsored. Therefore, I would reverse the district court with regard to appellants MCRI and ACRF and remand with instructions to allow those parties to intervene pursuant to Rule 24(a).

Appendix B–1

Case 2:06-cv-15024.DML.RSW Document 55
Filed 12/27/2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUITON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE

Case No. 06-15024

Hon. David M. Lawson

OPINION AND ORDER GRANTING MOTIONS TO EXPEDITE GRANTING IN PART AND DENYING IN PART MOTIONS TO INTERVENE AND STRIKING MOTION TO DISMISS

SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE

UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

OPINION AND ORDER GRANTING MOTIONS TO EXPEDITE, GRANTING MOTION TO INTERVENE BY ERIC RUSSELL, DENYING REMAINING MOTIONS TO INTERVENE, AND STRIKING MOTION TO DISMISS FILED BY THE AMERICAN CIVIL RIGHTS FOUNDATION AND THE MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE

Before the Court are three motions by various parties to intervene in this action either as plaintiffs or defendants. This case was commenced on November 8, 2006 by several plaintiffs as a challenge to a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions. The plaintiffs allege that the amendment violates the United States Constitution. The Court has reviewed the submissions of the parties and finds that the relevant law and facts have been set forth in the motion papers and that oral argument will not aid in the disposition of the motion. Further, the parties have sought expedited treatment

of their motions, and oral argument is impractical in light of that request. Accordingly, it is ORDERED that the motion be decided on the papers submitted. See E.D. Mich. LR 7.1 (e)(2). The Court finds that the interests of the proposed intervenors, save those of Eric Russell, are represented adequately by the parties presently before the Court, allowing intervention would interfere with the expeditious disposition of the present action, and therefore intervention is not in the interest of justice. Proposed intervenor Russell, however, has identified an individual interest that may not be represented adequately by the institutional parties now before the Court, and therefore his motion to intervene will be granted.

1.

A.

Although the lawsuit's filing the day after the election received some press coverage, there was little activity in the case for over a month after it was filed. Then on December 11, 2006, the three University defendants filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief, together with a motion for a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed, and a motion for expedited consideration. The Court ordered responses to the motion for injunction by December 18, 2006. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14,2006.

On December 18, 2006, the Court received a stipulation [dkt #26] from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief sought by the cross-claimants (the University defendants), and agreeing to dismiss with prejudice the portion of the cross-claim seeking a temporary injunction, and the balance of the cross-claim without prejudice. The Court approved the stipulation and entered an appropriate order on December 19, 2006.

Also on December 14,2006, a motion to intervene was filed by the American Civil Rights .Foundation and the Michigan Civil Rights Initiative Committee. The American Civil Rights Foundation appears to be a California-based organization and represents that it is a coalition of individuals who are opposed to the use of racial, gender, and ethnic factors by government in making decisions about letting contracts, education, and employment. The Michigan Civil Rights. Initiative Committee is the ballot question committee that sponsored the challenged ballot proposal. These two groups seek to intervene as defendants in the action. Along with their motion to intervene, they filed a motion to dismiss the complaint, but the plaintiffs filed an amended complaint on December 17,2006. They filed no motion for immediate consideration at that time.

On December 18, 2006, a motion to intervene as defendants was filed by a group called Toward a Fair Michigan, and an individual named Eric Russell. The mission of Toward a Fair Michigan, according to the affidavit of its chairperson, is to "promot[e] and foster[] balanced debate" on the ballot proposal, and "insure that the deliberate will of the people" is enforced. Aff.

of William Allen at ¶ 1. Eric Russell states that he is a Michigan citizen who intends to apply to law school at the University of Michigan next year.

Also on December 18, 2006, the City of Lansing filed a motion to intervene as plaintiff in the action. The City seeks a delay in the effective date of the constitutional amendment as to it because, it contends, it must work within the framework of certain municipal ordinances that mandate the use of racial and gender preferences in employment and letting contracts. The next day, Lansing filed a supplemental emergency motion to intervene in which it asks that it be allowed the benefit of the stipulation reached by the parties to the case with respect to the delay of the effective date of the constitutional amendment as to the University defendants' admission programs.

The American Civil Rights Foundation and Toward a Fair Michigan filed their motions to expedite the hearings on their intervention motions on December 19, 2006. They both make reference to the (now dismissed) cross-claim filed by the University defendants and the "additional filings" in the case as grounds for expedited consideration.

B.

The main thrust of the motions to intervene filed by the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, Toward a Fair Michigan, and Eric Russell is that some of the named defendants have evidenced through public statements their opposition to Proposal 2 or have otherwise demonstrated they will not vigorously defend its constitutionality. These contentions are focused on the Michigan Governor and the University

defendants, since the motions were filed presumably without the benefit of learning that the Michigan Attorney General, who publicly supported the proposal during the election, was allowed to intervene in the case. The City of Lansing seeks intervention as a plaintiff based on its "substantial interest in preserving its legislatively mandated purchasing and hiring ordinances and civil rights policies and procedures." Br. in Supp. of Mot. to Intervene at 7. Lansing's main goal is obtaining additional time to comply with the amendment's provisions.

The American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee argue that their request is timely even though it comes after the cross-claim by the University defendants was resolved and dismissed, they have a substantial interest in the subject matter of the lawsuit because of their activity in promoting passage of the proposal, their interest in ending affirmative action would be impaired if Proposal 2 were invalidated or narrowly interpreted, and the other parties could not represent their interests because those interests are inconsistent with the defendants' pre-election pronouncements about the ballot proposal.

The University defendants and the Governor respond with the arguments that the intervention request is untimely because the cross-claim has been resolved and the proposed intervenors failed to ask for expedited treatment of their motion despite the time-sensitive nature of the cross-claim. They also argue that the proposed intervenors failed to demonstrate a substantial interest in the litigation that is different than any voter who supported the proposal. They next contend that with the entree of the

Michigan Attorney General into the case, a full range of arguments addressing all the relevant issues will be presented to the Court, particularly in light of the attorney general's pledge to vigorously defend the amendment. Finally, the Governor asserts that the Court should view with skepticism the Michigan Civil Rights Initiative Committee's request to intervene because of the misconduct its members were found to have committed by the deception of Michigan citizens in obtaining the requisite number of signatures in support of Proposal 2 as described in *Operation King's Dream v. Connerly*, 2006 WL 2514115 (B.D. Mich. 2006). The Michigan Attorney General did not respond to the intervention motion by the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee.

In their motion to intervene, Toward a Fair Michigan and Eric Russell likewise contend that their request is timely. Russell says that he has an interest in the subject matter of the litigation because he is a white male seeking admission to the University of Michigan Law School next fall. The interest of Toward a Fair Michigan is less concrete; it asserts that it did not take a position concerning whether Proposal 2 should be passed, and its objective was to educate the public and see that the will of the electorate, whatever its decision, was implemented. Russell also argues that his interest in achieving admission to the University of Michigan would be impaired if Proposal 2 is struck down or narrowly construed, and Toward a Fair Michigan argues that its interests will be impaired if the will of the people is not upheld. These proposed intervenors also contend that their interests will not be represented adequately by the present parties based on

the Governor's pre-election statements in opposition to the proposal.

The University defendants and the Governor have repeated their responses in opposition to the intervention motions filed by Toward a Fair Michigan and Russell. The Michigan Attorney General did not respond to the intervention motion filed by these proposed intervenors.

The City of Lansing argues that its motion for intervention is timely because it filed the present motion promptly after discovery of its interest in the litigation. In identifying its interest in the subject matter of the present lawsuit, Lansing asserts that like the plaintiffs who seek to overturn Proposal 2, Lansing "has a similar interest not necessarily in overturning Proposal 2, but at least in delaying its implementation." Br. in Supp. of Mot. to Intervene at 7. Lansing also contends that disposition of the case may, as a practical matter, impair Lansing's interest because an adverse decision would defeat Lansing's efforts to achieve race and gender equality through local legislation. Finally, Lansing asserts that its interests are not adequately represented because none of the current parties will represent the interests and concerns of local governments effected by Proposal 2.

The Michigan Attorney General opposes Lansing's request to intervene primarily on the ground that Lansing has failed to establish that its interests will be inadequately represented by the current parties to the case. The attorney general insists that the movant has the burden of establishing inadequacy of representation, and this burden includes overcoming the presumption of adequacy of representation when the proposed intervenor and a party to the suit share

the same ultimate objective. The University defendants and the Governor did not respond to the intervention motion filed by the City of Lansing.

All movants also have sought permissive intervention as an alternative form of relief.

II.

Motions to intervene are governed by Federal Rule of Civil Procedure 24. Rule 24 allows two types of intervention: intervention by right and permissive intervention. With respect to both types of intervention, the Sixth Circuit has held that although "Rule 24 should be 'broadly construed in favor of potential intervenors,'" the court has cautioned that "this does not mean that Rule 24 poses no barrier to intervention at all." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). The court has affirmed the denial of motions to intervene by right and permissively for a variety of reasons. *See, e.g., Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854,863 (6th Cir. 2000) (affirming denial of a motion to intervene as of right, because the motion was untimely and the proposed intervenor's interests were adequately represented); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (affirming denial of motions to intervene permissively and as of right, in part because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case").

A.

Rule 24(a), dealing with intervention of right, states:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). "[T]o intervene as of right under Rule 24(a)(2), a proposed intervenor must establish the following four elements: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). "Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

The first element—timeliness—"should be evaluated in the context of all relevant circumstances." *Stupak-Thrall*, 226 F.3d at 472 (internal quotation marks omitted). A variety of factors are usually considered, including the developments in the case, the purpose for intervention, and how long the proposed intervenors knew of their interest in the property or transaction at issue before they sought permission to intervene. *Id.* at 473-74. In this case, the lawsuit challenges the implementation of a state constitutional

amendment that was to go into effect on December 23, 2006. None of the parties save Russell has offered an explanation why they waited for over a month to join the suit. Russell's individual interest became apparent when the University defendants sought a delay in the effective date of the state constitutional amendment and reached an agreement to that effect with others in the lawsuit. Since Russell's own admission prospects may be affected by that agreement, it was sensible for him to seek intervention when that information came to light. The other proposed intervening defendants, however, have interests that are no different than any Michigan citizen who voted in favor of the ballot proposal, and there was no obstacle to their taking action shortly after the lawsuit was filed and well in advance of the effective date of the amendment. Similarly, the City of Lansing no doubt was aware of the pending litigation and the effective date of the amendment, but it chose to wait for over a month before seeking an entree into the case. The Court believes that the citizens of the State are best served by a prompt resolution of the issues framed by the pleadings as to the constitutionality of their new state constitutional provision, and the delay in reaching that objective occasioned by the tardy requests to intervene, in light of all the circumstances of the case, renders the requests (save Russell's) untimely.

The second element—that the proposed intervenor proves a substantial legal interest in the property or transaction involved in the lawsuit—was addressed by the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), which the court denominated a "close case." There, the court of appeals wrote:

> This circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right. *See Purnell*, 925 F.2d at 948; *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally."). We have, for example, noted that an intervenor need not have the same standing necessary to initiate a lawsuit, *Purnell*, 925 F.2d at 948, and cited with approval decisions of other courts "reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest." *Id.* . . . The inquiry into the substantiality of the claimed interest is necessarily fact-specific.

Id. at 1245. The court in *Miller* held that the Michigan Chamber of Commerce had a sufficient legal interest in a suit challenging an amendment to Michigan's Campaign Finance Act not only due to its role in the political process that resulted in the adoption of the disputed amendment, but also by the fact that it was also specifically regulated by the legislation. *See id.* at 1247. Further guidance is provided by *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), where the court held that pro-affirmative action groups and minority applicants to the University of Michigan's undergraduate and law programs had a sufficient interest to justify intervention in a suit challenging the university's race-conscious admission programs because, if the lawsuit was successful and the affirmative-action programs eliminated, they would have a lesser chance of gaining admission. *See id.* at 400.

In this case, the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee argue that they were integrally involved in the drafting and promotion of Proposal 2. It would not be unreasonable to posit that the amendment would not have reached the ballot without their efforts. Therefore, although under *Miller*, the question of whether these organizations have a sufficient interest in the outcome of this litigation is perhaps a close one. However, involvement in the pre-election activity does not automatically establish a substantial interest in this litigation, as these proposed intervenors contend. *Miller* does not stand for the proposition that an organization that supports legislation *ipso facto* has a substantial legal interest in the outcome of a suit challenging such legislation. Rather, the court found a substantial interest where the Chamber of Commerce in that case was not a mere supporter of the legislation; it was also directly "regulated by at least three of the four statutory provisions challenged by the plaintiffs." 103 F.3d at 1247. There is no suggestion that either of these organizations will be affected by rulings concerning the amendment at issue in this case. They have not asserted that whatever ruling this Court hands down will have an impact on the vitality of the organizations, subject them to regulation, or expand or curtail their rights as organizations. They have not proved, therefore, that they have an "interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a).

The interest of Toward a Fair Michigan is even more tenuous. It has represented that it took *no* pre-election position of whether the proposal should pass, but it only sponsored debates about the merits of the ballot initiative. It states that its present mission

is to ensure that public officials carry out the will of the electorate and advise people of their rights under the new amendment. Toward a Fair Michigan has not identified any interest in its brief that would be impacted by a ruling of the Court.

The City of Lansing primarily seeks a delay in the application of the constitutional amendment to itself. It has argued that it is subject to regulation by the new law, and its impact will materially affect the operations of the City in its hiring and contract-letting decisions. Lansing has established a substantial interest in the litigation under *Miller*.

Likewise, Eric Russell is situated similarly to the intervenors in *Grutter v. Bollinger*, in that if the present plaintiffs are successful in obtaining a ruling that the constitutional amendment is invalid, Russell's chances of gaining admission to the University of Michigan law school may be diminished. *See Grutter*, 188 F.3d at 400.

Proof of the third element—that the proposed intervenor's ability to protect its interest may be impaired in the absence of intervention—is not an onerous task. "'To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Grutter*, 188 F.3d at 399 (quoting *Miller*, 103 F.3d at 1247). Of course, the inability to protect one's interest posits the existence of an interest to begin with. The American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and Toward a Fair Michigan have failed in that proof. Eric Russell and the City of Lansing have not.

The fourth element requires the proposed intervenor to prove the inadequacy of representation by others who are in the case, and it appears to be the most critical issue with respect to the present motions to intervene. In *Michigan*, the Sixth Circuit explained that

> [a]pplicants for intervention bear the burden of proving that they are inadequately represented by a party to the suit. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). This burden has been described as minimal because it need only be shown 'that there is a potential for inadequate representation.' *Grutter*, 188 F.3d at 400. Nevertheless, applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit. *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987).

United States v. Michigan, 424 F.3d at 443-44. In *Grutter*, the courts of appeals held that the burden of proof concerning inadequacy of representation remains the same when the existing party (the putative representative of the proposed intervenor's interests) is a governmental entity. *Grutter*, 188 F.3d at 400. To meet this burden, "[i]t may be enough to show that the existing party who purports to seek the same outcome may not make all of the prospective intervenor's arguments." *Ibid.* (internal quotation marks omitted).

The main argument by the proposed intervening defendants on the adequacy of representation is that the original parties to the lawsuit all had been opposed to the ballot proposal before the election. That

argument certainly had some force before the Michigan Attorney General was allowed to intervene in the case. There is evidence showing that Governor Granholm made public statements calling for the rejection of Proposal 2 prior to election day and lamenting its subsequent passage. The University defendants plainly oppose Proposal 2 as evidenced by their cross-claim in this action contesting the constitutionality of the amendment and seeking the delay of its implementation. However, the Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage. The Attorney General's office has taken pains to divide its sections representing the Governor and its own interests and has isolated the two divisions. For his own part, the assistant attorneys general assigned to represent the General's own interests have averred that the Michigan Attorney General will "ensure that the Court is presented with a full range of arguments . . . so that a vigorous defense of the constitutionality of [Proposal 2] may be had." Mot. to Expedite Mot. to Intervene by Attorney General at ¶ 9.

The proposed intervening defendants have challenged the attorney general's ability to represent their interests by arguing that, no matter how well the attorney general may represent the electorate, it is doubtful that he will be able to represent the specific interests of the sponsors and drafters of Proposal 2. This argument is as imprecise as it sounds, but the theory essentially appears to be that the attorney general will not defend Proposal 2 with as much fervor as the proposed intervenors would. However, the "interest" of the proposed intervenors in seeing the constitutional amendment upheld is no different than the majority of Michigan citizens who voted for its

passage. There is no proof in this record that the proposed intervenors or their lawyers would be more capable than the elected attorney general of mounting a defense to the amendment, or that their arguments would be more compelling or credible or better founded. Since the interests of proposed intervenors the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and Toward a Fair Michigan are precisely aligned with those of the Michigan Attorney General, and because there is little likelihood that their participation would shed any new light on the issues presented, they have not shown that the present parties, as they are now aligned, would be inadequate to advance their interests.

Similarly, the City of Lansing has not made a convincing argument that its interests are not well-represented. The named plaintiffs oppose Proposal 2, the Universities largely oppose Proposal 2, and Governor Granholm has publicly displayed her disagreement with the amendment. The current parties to the suit—private organizations, a variety of individuals, and labor unions—seem to be interested in the amendment's impact on education, employment, and public contracts. Under these circumstances, the Court finds that Lansing's interests appear to be adequately represented.

The circumstances of Eric Russell are different. Russell is the only intervenor who has alleged an individual interest that may not be taken into account by the present parties. He has alleged a personal stake in seeing that his law school admission chances are not diminished by a narrow construction or invalidation of the amendment. His interest extends beyond those of

the citizens and election groups that promoted or opposed the ballot proposal. He seeks the implementation of Proposal 2 now, while his application is being processed. The other parties do not represent that position. Russell, therefore, has established the fourth element for intervention by right.

The Court finds that none of the proposed intervenors except Eric Russell have made the proper showing to establish a right to intervene in this case under Rule 24(a).

B.

Rule 24 also sets out the standard for permissive intervention. It states:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). An applicant for permissive intervention, therefore, must prove that the motion for intervention is timely, there is at least one common question of law or fact, and the balancing of undue delay, prejudice to the original parties, and any other relevant factors favors intervention. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The Court has found that the motions to intervene by the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, Toward a Fair Michigan, and the City of Lansing are not timely. Moreover, it is paramount that the issues in this case are resolved promptly. Michigan's public institutions will serve its citizens best when they have a clear understanding of the requirements and limitations of the State's new constitutional amendment. That clear understanding will not be achieved until the conclusion of the judicial process. This Court has no delusion that its pronouncement will be the last word on the subject. History has confirmed that the district courts, in cases of this importance, are mere way stations on the judicial road to a final resolution by courts beyond. Nonetheless, the case must pass through this stage—and promptly—before the goal of finality can be realized.

Allowing additional parties into the lawsuit at this stage of the proceedings will inhibit, not promote, a prompt resolution by this Court. Additional parties no doubt could seek to file more claims, amend pleadings even further, and inject issues that may not lead directly to a resolution of the issues circumscribed by the present pleadings. The rules of civil procedure, including Rule 24(b), must be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. After balancing the relevant factors, the Court determines that allowing discretionary intervention will not advance that objective.

III.

The Court has found that proposed intervenor Eric Russell has established a right to intervene. The Court

is not persuaded that the remaining proposed intervenors ought to intervene in the present action. One of the proposed intervenors has filed a motion to dismiss, which will be stricken because it was not filed by a proper party to the case.

Accordingly, it is **ORDERED** that the motions to expedite the motion to intervene by Eric Russell and Toward a Fair Michigan [dkt #43], the American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt #41], and the City of Lansing [dkt #38] are **GRANTED**.

It is further **ORDERED** that the motion to intervene by Eric Russell [dkt #27] is **GRANTED**.

It is further **ORDERED** that the motion to intervene by Toward a Fair Michigan [dkt #27] is **DENIED**.

It is further **ORDERED** that the motion to intervene by American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt # 16] is **DENIED**.

It is further **ORDERED** that the motion to intervene by City of Lansing [dkt # 31] is **DENIED**.

It is further **ORDERED** that the motion to dismiss by American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt # 21] is **STRICKEN**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 27, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 27, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

Appendix C–1

FILED DEC 17 2007 LEONARD GREEN, Clerk

Nos. 06-2653/2656

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, ET AL.,	)	
Plaintiffs-Appellees,	)	**ORDER**
v.	)	
JENNIFER GRANHOLM, ET AL.,	)	
Defendants-Appellees,	)	
MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE, ET AL.,	)	
Proposed Intervenors-Appellants.	)	

BEFORE: KENNEDY, MARTIN, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green, Clerk

Westlaw

Federal Rules of Civil Procedure Rule 24

United States Code Annotated Currentness

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Title IV. Parties

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

Amendments received to 12-01-07

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Federal Rules of Civil Procedure Rule 24

UNITED STATES CODE ANNOTATED

FEDERAL RULES OF CIVIL PROCEDURE **FOR THE UNITED STATES DISTRICT COURTS**

IV. PARTIES

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconstitutional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency

upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

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MICHIGAN COMPILED LAWS ANNOTATED CURRENTNESS

MICHIGAN CONSTITUTION OF 1963

CHAPTER 1. **THE FUNDAMENTAL LAW CONSTITUTION OF THE STATE OF MICHIGAN 1963**

ARTICLE I. DECLARATION OF RIGHTS

§ 26. Affirmative action

Sec. 26. (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

<Effective January 1, 1964>

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No. 07-1182

FILED
JUN 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN); and JENNIFER GRANHOLM, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT UNIVERSITIES' BRIEF IN OPPOSITION

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June 10, 2008

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QUESTIONS PRESENTED

1. Whether the Sixth and Ninth Circuits are split as to whether a public interest group involved in the enactment of a ballot measure, after such measure has passed and has become valid law, maintains an "interest" under Fed. R. Civ. P. 24(a)(2) in a suit challenging the new law on substantive, as opposed to procedural, grounds.

2. Whether the District Court's decision would stand even if the Petitioners' legal interests are substantial.

PARTIES TO THE PROCEEDINGS

Respondent Universities include the following: Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University (collectively, the "Universities").

The Universities accept the Petitioners' statement regarding the parties to the proceedings in all other respects.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Universities respectfully submit this brief in opposition to a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Universities accept the Petitioners' statement regarding the opinions below.

JURISDICTION

The Universities accept the jurisdictional statement of Petitioners.

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, Rule 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

STATEMENT OF THE CASE

A. Michigan Enacts Proposal 2 Amid Controversy

Michigan voters passed Proposal 2, a ballot initiative, on November 7, 2006, amending the Michigan Constitution. The amendment bans "preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const., art. 1, § 26. In the prelude to the 2006 election, however, the activities of Petitioner Michigan Civil Rights Initiative Committee (MCRIC) in promoting Proposal 2 stirred controversy and spawned legal challenges.

Lower federal courts have found MCRIC was successful in putting Proposal 2 on the ballot "through methods that undermine the integrity and fairness of our democratic processes." *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007). Specifically, the United States District Court for the Eastern District of Michigan found that "'MCRI and its circulators engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action.'" *Id.* at 589 (quoting *Operation King's Dream v. Connerly*, 2006 WL 2514115, at *11-12 (E.D. Mich. 2006)). Despite the fact that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception," the Sixth Circuit concluded that the MCRIC's pre-ballot maneuvers could not invalidate

election results after the fact. *Operation King's Dream*, 501 F.3d at 591.

B. Organizations and Individuals Challenge Proposal 2 in Federal Court

On November 8, 2006, the day after Proposal 2 was passed but before it was scheduled to go into effect, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary (BAMN), as well as other groups and individuals, filed suit against Michigan Governor Jennifer Granholm and several universities: the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. BAMN sought a declaratory judgment that the constitutional amendment violated various federal laws. App. A-9. BAMN also sought a permanent injunction to prevent enforcement of the new law. *Id.*

On December 11, 2006, the Universities filed a cross-claim against Governor Granholm for a preliminary injunction that would allow them to use their existing admissions and financial aid policies through the end of the 2007 admissions cycle. *Id.* On December 14, 2006, Michigan Attorney General Michael Cox filed a motion to intervene coupled with a motion for expedited consideration. App. B-4. The District Court granted both of the Attorney General's motions on December 14. *Id.*

On December 18, 2006, the parties to the action – Plaintiffs, the Universities, the Governor and the Attorney General – filed a stipulation with the District

Court. App. B-5. According to the stipulation, the new constitutional amendment was enjoined as to the Universities through July 1, 2007, which marked the end of the Universities' pending admissions and financial aid cycles. *Id.* The parties also stipulated that the Universities' cross-claim would be dismissed in its entirety. *Id.* The next day, the District Court entered an Amended Order Granting Temporary Injunction and Dismissing Cross-Claim.

C. Petitioners and Others Seek to Intervene

Three additional groups, a city and an individual, Eric Russell, also sought to intervene during a brief, hectic period in December of 2006. On December 14, MCRIC and the American Civil Rights Foundation (ACRF) filed a motion to intervene coupled with a motion to dismiss. App. B-5. Plaintiffs then filed an amended complaint on December 17. Neither MCRIC nor ACRF filed a motion for immediate consideration at that time. *Id.*

On December 18, Towards a Fair Michigan (TAFM), the City of Lansing, and Eric Russell, a white applicant to the University of Michigan Law School, moved to intervene as well. App. B-5-6. On December 19, TAFM and ACRF filed motions to expedite the hearings on their intervention motions, and the City of Lansing filed a supplemental emergency motion to intervene. App. B-6.

D. The District Court Denies the Motions to Intervene on Multiple Grounds

In a ruling on December 27, 2006, the District Court granted Russell's motion to intervene, but denied the motions for MCRIC, TAFM, ACRF, and the City of Lansing to intervene, on multiple grounds. App. B-12-21. With regard to its denial of those motions made pursuant to Fed. R. Civ. P. 24(a), the District Court held: (1) the motions were not timely; (2) the proposed intervenors had no substantial legal interest in the action; (3) the proposed intervenors' interests would not be impaired in the absence of intervention; and (4) the parties before the court would adequately represent the proposed intervenors' interests. *Id.*

The District Court's reasons for denying intervention rested on factual findings made by the court. For instance, with regard to whether the proposed intervenors would be adequately represented, the District Court stated that there was "no proof in this record that the proposed intervenors or their lawyers would be more capable than the elected attorney general of mounting a defense to the amendment, or that their arguments would be more compelling or credible or better founded." App. B-18. The court noted that "the Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage," even while the Governor "made

public statements calling for the rejection of Proposal 2 prior to election day. . . ." App. B-17.[1]

E. The Sixth Circuit Denies the Petitioners' Appeal

On September 6, 2007, the United States Court of Appeals for the Sixth Circuit denied Petitioners' Appeal of the District Court's decision regarding intervention. App. A-21-22. The Sixth Circuit based its holding on Petitioners' lack of any substantial legal interest in the subject matter of the case and therefore declined to address the remaining factors necessary for intervention of right. The Sixth Circuit also affirmed the District Court's denial of permissive intervention.

F. Proposal 2 In Effect

The day after the District Court granted his motion to intervene, Russell filed an Emergency Motion for a Stay Pending Appeal. The Sixth Circuit granted the stay on December 29, 2006. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006). As a result, Proposal 2 went into effect with respect to the Universities as of that date. After consolidating the case with another, related case, the District Court dismissed the Plaintiffs' challenges to Proposal 2 by opinions and orders dated March 18, 2008. *Coalition to Defend Affirmative Action v.*

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[1] Respondent Universities object to Petitioners' Statement of the Case to the extent it presents factual evidence that contradicts or supplements the District Court's factual findings in deciding Petitioner's motion to intervene.

Regents of the University of Michigan, 539 F. Supp. 2d 924, 930 (E.D. Mich. 2008); *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d 960, 964 (E.D. Mich. 2008) (resolving various outstanding motions).[2]

At the heart of the District Court's decision was its granting of the Michigan Attorney General's motion for summary judgment with respect to the Plaintiffs' constitutional challenges to Proposal 2. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 944-60. Just four days before the District Court's decision, MCRIC and ACRF had filed their Petition for a Writ of Certiorari in this Court, arguing, *inter alia*, that their interests were not adequately represented by Michigan's Attorney General. Petitioners' Brief at 17-24.

After the dismissal of the Coalition and Cantrell Plaintiffs' cases, the Cantrell Plaintiffs filed a motion to amend/alter the judgment of the District Court. The Coalition Plaintiffs, Eric Russell and the Universities appealed the Opinion and Order of the District Court

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[2] On January 5, 2007, the District Court consolidated the Coalition Plaintiffs' case with that of the Cantrell Plaintiffs, who were challenging Proposal 2 under a different constitutional theory. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 932. The Universities are defendants only as to the Coalition Plaintiffs.

to the Sixth Circuit.[3] Proposal 2 remains in effect today.

ARGUMENT

A. No Relevant Split Exists Between the Sixth and Ninth Circuit Standards Regarding What Constitutes an "Interest" Under Fed. R. Civ. P. 24(a)(2)

Petitioners claim that a circuit split exists between the Sixth and Ninth Circuits with regard to intervention of right. In actuality, the Sixth and Ninth Circuits apply the same basic factors to determine whether intervention of right is warranted. Moreover, there is no indication that the Ninth Circuit would apply the "interest" factor of that analysis any differently to the present facts than did the Sixth Circuit.

The elements required for intervention of right, which track closely the language of Fed. R. Civ. P. 24(a), remain fairly uniform across the circuit courts. A proposed intervenor must establish the following: (1) that the motion to intervene was timely; (2) that the intervenor has a substantial legal interest in the subject matter of the case; (3) that its ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before

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[3] After the Coalition Plaintiffs appealed the dismissal to the Sixth Circuit, the Universities cross-appealed the same decision's denial of the Universities' motion to dismiss the Universities as parties. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 940-45.

the court may not adequately represent its interest. *Northland Family Planning v. Cox*, 487 F.3d 323, 345-46 (6th Cir. 2007); *accord Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). The central issue raised by Petitioners' brief is the requirement that one seeking to intervene of right have an interest in the subject matter of the case.

In both the Sixth and Ninth Circuits, a public interest group may be found to have a substantial legal interest in a measure that it sponsored when the resulting law is later challenged on procedural grounds. *Northland Family Planning*, 487 F.3d at 345-46 (noting that had the public interest group "sought to intervene in a suit challenging the legislative process by which the statute was enacted, its legal interest would be significantly stronger due to its involvement in the passage of the Act"); *Idaho Farm Bureau Federation*, 58 F.3d at 1395 (9th Cir. 1995); *Sagebrush Rebellion v. Wyatt*, 713 F.2d 525, 526 (9th Cir. 1983); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980).

The Sixth Circuit has addressed an entirely different situation with recent precedent, namely the situation where such a law, after its enactment, is challenged on *substantive* grounds. *Northland Family Planning*, 487 F.3d at 345. In those situations, the Sixth Circuit has held that the public interest group has no substantial legal interest after the measure becomes law. *Id.* Petitioners have pointed to no Ninth Circuit case that conflicts with the Sixth Circuit's stance on the ability of public interest groups to intervene in *substantive* challenges to already-enacted laws.

Three of the four Ninth Circuit cases cited by Petitioners as purported evidence of a circuit split analyze intervention in the context of a procedural challenge, not a substantive one.[4] *Idaho Farm Bureau Federation*, 58 F.3d at 1395 (relating to suit to "set[] aside the final rule" listing animal as endangered species "because the [government agency] committed several procedural errors during the period between the initial proposal and the final listing"); *Sagebrush Rebellion*, 713 F.2d at 526 (noting that lawsuit "challeng[ed] the legality of actions taken by former [government official] when he recommended the creation of a . . . Conservation Area . . . and then, by public order . . . withdrew . . . land in the proposed conservation area from selection and entry under the Desert Land Act"); *Idaho v. Freeman*, 625 F.2d at 887 (dealing with "suit challenging procedures for ratification of the proposed Equal Rights Amendment . . .").

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[4] The Sixth Circuit found this substantive/procedural distinction to be vital to its recent opinion in *Northland Family Planning*, 487 F.3d at 345, which relied on that point to distinguish many of the same Ninth Circuit cases now invoked by Petitioners:

> We find this distinction to be compelling, as the public at large – including public interest groups – has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant.

Only one case cited by Petitioners, *Spellman*, involved a substantive challenge. *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982). The Ninth Circuit's language in *Spellman* in favor of intervention, however, was pure *dicta*. "[W]hile we sustain [the public interest group's] appeal [with regard to invervention]," stated the court, "this reversal does not require a new trial because the holding of the case would not be changed." *Id.* In *Spellman*, the public interest group "was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered." *Id.* The Ninth Circuit's finding in *Spellman* that the public interest group should have been granted intervention was immaterial to its ultimate disposition. *See id.* (affirming decision of district court regarding summary judgment despite reversal on intervention issue).

Since the case at hand presents a substantive challenge to Michigan's Constitution, the Ninth Circuit precedent cited by Petitioners does not conflict with the Sixth Circuit's ruling. Others have already waged a procedural challenge to the enactment of Proposal 2, which challenge was ultimately denied. *Operation King's Dream*, 501 F.3d at 591. Consistent with what the Sixth and Ninth Circuits might require, Petitioner MCRIC participated fully in that litigation. *Id.*

B. The District Court's Decision Would Be Affirmed Regardless of Whether Petitioners' Legal Interests Were Substantial

In the decision below, the Sixth Circuit affirmed the District Court's opinion based on only one of the District Court's multiple grounds for denying intervention to Petitioners. App. A-13. In addition to finding that Petitioners had no substantial legal interest, discussed *supra*, the District Court also found that Petitioners' motions for intervention were untimely, and that their interests were adequately represented by existing parties to the action. App. B-11-21. Even if the Sixth Circuit had found that Petitioners had a substantial legal interest, it could have affirmed the District Court opinion on one or both of the remaining grounds and similarly denied intervention of right.

1. Petitioners' Motions to Intervene Were Untimely

A district court's finding regarding the timeliness of a Fed. R. Civ. P. 24(a) motion is reviewed for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973), *superseded on other grounds*, *United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178 (D.C. Cir. 1983). This Court has described precisely how to evaluate the timeliness of a motion to intervene:

> If it is untimely, intervention must be denied. . . . Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive.

> Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id.

The District Court found Petitioners' motions for intervention untimely. App. B-11-12. As noted by the District Court, Petitioners waited over a month after the filing of the highly publicized lawsuit before they moved to intervene. App. B-12. As noted *supra*, neither Petitioner asked for expedited treatment of their motion to intervene until *after* the parties had reached a stipulation on matters central to the case. Michigan's Attorney General, on the other hand, requested expedited treatment at the same time his motion for intervention was filed. App. B-4.

In light of all of the circumstances, the District Court acted within its discretion when it determined that "the citizens of the State are best served by a prompt resolution of the issues framed by the pleadings as to the constitutionality of their new state constitutional provision, and the delay in reaching that objective occasioned by the tardy requests to intervene, . . . renders the requests (save Russell's) untimely." App. B-12. Regardless of whether Petitioners possessed a substantial legal interest in the subject matter of the action, their motions were untimely and therefore properly denied in the discretion of the District Court.

2. Petitioners' Motions to Intervene Were Properly Denied Based on a Finding that Their Interests Were Adequately Represented

The District Court also found that Petitioners' interests were adequately represented by Michigan's Attorney General. This finding provided a sufficient basis for the District Court to deny Petitioners' motion to intervene of right. Thus, even if Petitioners could prove a substantial legal interest in the action, they would not succeed in establishing their right to intervene.

Petitioners wish to characterize the District Court's decision as promoting a broad, sweeping rule that public officials such as a state's attorney general are always presumed to act in the interests of the citizenry. This is not the case. Rather, the District Court made a factual finding that Petitioners were adequately represented by the Attorney General, based on the information before the court in an expedited setting. App. B-16-18.

The District Court made a number of important factual findings with respect to this issue. For example, the District Court found that the "Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage." App. B-17.[5] And the District Court observed that the Attorney

---

[5] Respondent Universities accordingly disagree with statements by Petitioners classifying Michigan's Attorney General as a mere "political opponent of the new law." Petitioner's Brief at 27.

General's office had "taken pains to divide its sections representing the Governor and its own interests and has isolated the two divisions." *Id.* In essence, the District Court found that the interests of Petitioners and the interests defended by the Attorney General were one and the same: both supported Proposal 2 and sought to defend its constitutionality. Those factual findings should stand absent clear error.

Arguments now put forward by Petitioners that their interests diverged from those of the Attorney General because they would have made different decisions are not only self-serving, but they defy the factual findings of the District Court. Mere disagreements as to strategy do not equate to a divergence of interests or, ultimately, the inadequacy of representation. *See, e.g., Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *United States v. City of Miami*, 278 F.3d 1174, 1178-79 (11th Cir. 2002); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Moosehead San. Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979).

Indeed, the subsequent history of litigation between the parties only confirms the District Court's factual findings. Since Petitioners' motions for intervention were denied, the Attorney General has fought, and prevailed, on the issue of the Proposal's constitutionality. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d 924, 944-60 (E.D. Mich. 2008) (granting Attorney General's motion for summary judgment and dismissing constitutional claims by Plaintiffs).

In fact, when MCRIC and ACRF filed their Petition for a Writ of Certiorari on March 14, 2008, the District Court had not yet issued its comprehensive dismissal of Plaintiffs' claims. The District Court's March 18, 2008 granting of the Attorney General's dispositive motion significantly undercuts Petitioners' claim that they lack proper representation. Should this Court ultimately allow Petitioners to intervene, the adequacy of their representation will not improve, and neither will the dockets of the federal courts below.

CONCLUSION

For the foregoing reasons, Respondent Universities respectfully request that this Court deny the petition for writ of certiorari.

DATED: June 10, 2008.

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COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND TO FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, et al.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should the Court abandon the settled four-element inquiry under Rule 24(a)(2) of the Federal Rules of Civil Procedure, substituting a *per se* rule that ballot-initiative sponsors *always* have a right to intervene in litigation challenging measures enacted with their support because state governments, as a matter of law, are categorically disqualified from mounting an adequate defense of such measures?

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BRIEF IN OPPOSITION

The petition seeks review of a decision that is consistent with settled law, supported by robust policy considerations, and of a sort this Court has long recognized to be rarely appropriate for discretionary review.[1] *See Mo.-Kan. Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation [are], barring very special circumstances, a matter for the [trial] court"); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33-34 (1993) (per curiam) (noting that "[w]hile the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case" and that "addressing a relatively factbound issue . . . does not meet the standards that guide the exercise of our certiorari jurisdiction").

For these reasons, set forth more fully below, Respondents Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") request that the Court deny the petition for a writ of *certiorari* to review the opinion of the Court of Appeals for the Sixth Circuit reported at 501 F.3d 775.

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[1] The Cantrell Plaintiffs file this brief at the Court's request; believing the petition to be without merit, they initially waived their right to file an opposition brief.

COUNTERSTATEMENT OF THE CASE

The underlying litigation is a constitutional challenge to Michigan's ban on affirmative action ("Proposal 2"), enacted in November 2006 through the state's ballot initiative process. Plaintiffs are two, separate putative classes that include students, prospective students and faculty at Michigan's public universities.[2] The original named defendants were the Governor of Michigan and each of Michigan's three public universities.

Shortly after the complaint was filed, Michigan Attorney General Michael A. Cox was granted leave to intervene as a defendant in light of his statutory duty to defend the state's laws from constitutional challenge and his strong support for Proposal 2. *See Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 371 (E.D. Mich. 2006). The district court also permitted the intervention of a white male Michigan resident who sought to protect his interest in having his then-pending law school application decided with Proposal 2 in effect. The district court denied motions to intervene by the ballot-question committee that sponsored Proposal 2 (the Michigan Civil Rights Initiative Committee ("MCRIC")), and two other political organizations (the American Civil Rights Foundation ("ACRF") and Toward a Fair Michigan ("TAFM")). *Id.* On September 6, 2007, the Court of Appeals affirmed the district court's denial of intervention with respect to each of those

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[2] These two groups, represented by separate counsel, are referred to as the "Coalition Plaintiffs" and the "Cantrell Plaintiffs".

organizations, holding that they "lack[ed] a substantial legal interest in the outcome of this case." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 783 (6th Cir. 2007). MCRIC and ACRF ("Petitioners") unsuccessfully sought *en banc* review, and now petition this Court for a writ of *certiorari*.

Governor Granholm was dismissed from this action on September 5, 2007. The remaining parties have conducted thorough discovery, followed by dispositive motion practice. On March 18, 2008, the district court granted Attorney General Cox's motion for summary judgment and dismissed both the Cantrell and Coalition Plaintiffs' claims. A motion by the Cantrell Plaintiffs to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure was timely filed with the District Court on April 1, 2008, and is currently pending.

REASONS FOR DENYING THE PETITION

The petition should be denied because the decision below reflects the proper application of well-settled law. Moreover, the petition seeks the wholesale replacement of the intervention inquiry under Rule 24(a)(2) of the Federal Rules of Civil Procedure and invites this Court to create an unnecessary and counterproductive *per se* rule – that states can never adequately defend ballot-enacted legislation – which is repulsive to both the dignity of state governments and the sound discretion of the district courts.

I. The Decision Below Is Consistent With Well-Settled Law and Reflects the Sound Policy Judgments Embodied in Rule 24(a)(2).

The rule in every circuit – as Petitioners do not dispute – is that a proposed intervenor must establish four conditions in order to obtain intervention as of right under Rule 24(a)(2): (1) that the motion to intervene is timely; (2) that the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) that the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent the proposed intervenor's interest. *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); *see also, e.g., Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Courts have held repeatedly that an advocacy group that employs an initiative process to secure enactment of a new law lacks a cognizable interest entitling it to intervene as of right in subsequent litigation challenging such an enactment's validity – unless the group itself is regulated by the law. *Coalition*, 501 F.3d 775; *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007); *see also FM Properties Operating Co. v. City of Austin*, 71 F.3d 879, 1995 WL 727288, at *2 (5th Cir. 1995) (unpublished table disposition) (affirming denial of intervention by conservation organization notwithstanding its argument "that as the representative of the sponsor of the ballot initiative [whose application was at issue], it had a *per se* right

to intervene"); *Keith*, 764 F.2d at 1270 (affirming denial of intervention by pro-life advocacy group, explaining that such a group was not entitled "to forever defend statutes it helped enact").[3]

The opinion below is firmly grounded in that precedent. It is also consistent with this Court's skepticism respecting ballot initiative sponsors' purported "quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (vacating judgment appealed from on other grounds, but adverting to "grave doubts" as to whether ballot initiative sponsors had standing to pursue an appeal in view of the fact that "this Court has [n]ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated").

Specifically the Sixth Circuit in the instant case explained that Petitioners "have only a general ideological interest in seeing that Michigan enforces Proposal 2", noted that "neither the MCRI[C] nor the ACRF maintains that it or its members are specifically regulated by those portions of Michigan's constitution amended by Proposal 2" and held that "[a]n interest so generalized will not support a claim

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[3] As discussed more fully *infra* at Section III, the "direct and dramatic" circuit split Petitioners claim to identify with respect to this issue (Pet. at 17) rests entirely on a single paragraph, arguably *dicta*, in one case from the Ninth Circuit.

for intervention as of right." 501 F.3d at 782 (internal quotation marks omitted).[4]

This settled rule is supported by sound policy. There are compelling reasons not to enact a presumptive right for ballot sponsors to intervene in litigation challenging measures whose enactment they supported. Most fundamentally, our political system allocates to the *state* primary responsibility for defense and enforcement of the law. *Northland*, 487 F.3d at 345 ("[T]he public interest in [an enacted measure's] enforceability is entrusted for the most part to the government."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (explaining that "the power to create and enforce a legal code, both civil and criminal[,] is one of the quintessential functions of a State" and that only the State has a "direct stake . . . in defending the standards embodied in that code") (internal citations and quotation marks omitted). *See also Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005). Moreover, as discussed more fully below, Rule 24(a)(2) is designed to give the district courts

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[4] The Sixth Circuit also noted that another panel of that Court had recently reached the same conclusion in a nearly identical case. *See Northland*, 487 F.3d at 345 (affirming denial of intervention to the sponsor of a citizen-initiative process resulting in enactment of Michigan's Legal Birth Definition Act, holding that the organization's "legal interest can be said to be limited to the passage of the Act rather than the state's subsequent implementation and enforcement of it.") This Court denied a petition for *certiorari* by the proposed intervenor in that case on January 7, 2008. *Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 128 S. Ct. 872 (2008).

flexibility and discretion in addressing the "factbound" question of which persons or entities are appropriately situated to participate in any particular litigation. *See Izumi*, 510 U.S. at 34. That question is as germane to a constitutional challenge to a ballot-enacted measure as it is to any other form of litigation.

II. Petitioners' Proposed *Per Se* Rule Would Conflate the Elements of the Rule 24(a)(2) Analysis, Ignore the Reality that State Governments Can Competently Defend Their Own Laws, and Eviscerate the Discretion of the District Courts.

As Petitioners openly concede, their theory for why this Court should grant review rests upon a conflation of at least two of the four well-established elements of the intervention analysis under Rule 24(a)(2). *See* Pet. at 24 (insisting that "the adequacy with which Petitioners' interests will be represented effectively determines the substantiality of those interests"). As noted above, a movant must establish four elements to intervene as of right: (1) timeliness; (2) cognizable legal interest; (3) potential impairment of that interest; and (4) inadequacy of representation by those already parties. *See infra* Part I.

Petitioners, however, contend that ballot initiative sponsors *always* have a legally cognizable interest in litigation challenging enactments they have supported because the government can *never* be trusted to enforce and defend such laws itself. Thus, by conflating the "interest" and "adequacy" elements of the intervention analysis, Petitioners' rule would eliminate the "factbound" inquiry contemplated by

Rule 24(a)(2).[5] *See Izumi*, 510 U.S. at 33-34. This represents both a radical and unsupported departure from the Federal Rules of Civil Procedure and a disparagement of public servants who, like Attorney General Cox, competently and zealously defend the laws as they are sworn to do.

The Attorney General intervened in this litigation with the express purpose of ensuring a "vigorous defense" of Proposal 2. Cox Mot. to Intervene, at 5, 7, 11.[6] As "the state's chief law enforcement officer", the Attorney General "has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted . . . by the People of Michigan themselves, when those laws are challenged". *Id.* at 13-14. *See also* Mich. Comp. Laws § 14.28.

And Attorney General Cox has steadfastly fulfilled that role. From his first appearance in this litigation, the Attorney General has actively defended Proposal 2. He contested nearly 90% of Plaintiffs' Joint Proposed Stipulation Of Facts,

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[5] Petitioners' *amicus* Mountain States Legal Foundation would apparently have the Court abrogate the four-factor test (and hence Rule 24(a)(2)) altogether, in favor of a "bright line rule that an initiative's sponsors may, as a matter of right, intervene in litigation challenging the constitutionality of their [sic] enactment". *Amicus Curiae* Brief of Mountain States Legal Foundation In Support of Petitioners at 10. That self-serving suggestion, of course, could not be implemented without amending Federal Rule 24 and overturning decades of well-reasoned precedent.

[6] A copy of the Attorney General's Motion to Intervene is appended hereto.

opposed both the Cantrell and Coalition Plaintiffs' motions for class certification, and actively participated in discovery. Moreover, the Attorney General's representatives have briefed, argued and now *won* a motion for summary judgment as to all claims presented by both sets of plaintiffs. *Coalition to Defend Affirmative Action v. Granholm*, 539 F. Supp. 2d 924 (2008). It is beyond legitimate dispute that Attorney General Cox has zealously represented the interests of all those who support Proposal 2 – including Petitioners – and there is every reason to believe that he will continue to do so in the event that further proceedings take place in the district court or in the Sixth Circuit.[7] Moreover, petitioners have not identified, even at this late stage, a single factual assertion or legal argument omitted by the

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[7] Michigan Governor Jennifer Granholm, who was initially named as a defendant, has been critical of Proposal 2. However, the Governor has never taken an active role in the litigation, and was voluntarily dismissed from the action on September 5, 2007 in light of the Attorney General's intervention. Petitioners also make much of a temporary (and extremely short-lived) stipulated injunction entered by the district court in the first weeks of the litigation. Pet. at 7, 23-24. However, the practical and logistical considerations that motivated the Attorney General to agree to that stipulation do not undermine his ability to defend Proposal 2. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (holding that disagreement between a current party and proposed intervenor over whether the district court should enter a permanent injunction was "not central to [the] declaratory judgment action" and "only a difference in strategy" too "minor" to raise an inference of inadequate representation); *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) ("A difference of opinion concerning litigation strategy . . . does not overcome the presumption of adequate representation.").

Attorney General that they would have proffered in the course of this litigation.

The *per se* rule advocated by Petitioners is as unworkable in practical terms as it is inconsistent with the reality that state governments can – and as in this case, frequently do – mount a robust defense of legislation enacted through an initiative process. To begin with, Petitioners do not identify *which* supporters of a ballot initiative should in their view have a *per se* right to intervene such litigation. Petitioner ACRF, for instance, is an out-of-state, nationwide organization devoted to the elimination of affirmative action across the nation. It is not an official ballot-question committee. A presumption that such organizations are entitled to intervene would constitute a blanket license for virtually any advocacy group to inject itself into litigation addressing ballot-enacted legislation of concern to them.

By contrast, a principal virtue of the four-part test under Rule 24(a)(2) is the flexibility it affords the district courts to control the identity and number of the parties before them. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 & n.2 (9th Cir. 1983) (allowing intervention by the national office and five local chapters of the National Audubon Society, five Idaho non-profit environmental organizations and four individual residents partly on the basis that "[t]hroughout these proceedings intervenors have asserted a unitary interest and spoken with one voice" and cautioning that "[n]othing in this opinion should be interpreted as approving participation by

the intervenors on any other basis").[8] Petitioners would propose to strip the district courts of that discretion with respect to such groups.

Indeed, a *per se* federal rule purporting to delineate the categories of initiative supporters entitled to intervene is impossible because each state that permits legislation through referendum has its own set of procedures for placing issues on the ballot. Michigan law, in fact, provides for *two* such procedures – each of which contemplates different roles for sponsors, citizens, and the legislature. Mich. Const. Art. 2, § 9. Moreover, Petitioners and their *amici* appear to advocate for a *perpetual* right to intervene – *i.e.* no matter how great the lapse of time between a measure's enactment and the initiation of litigation challenging it.

The fatal complexity of any effort to deploy Petitioners' proposal in practice is matched only by the absurdity of Petitioners' premise that every

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[8] Moreover, the very evil that Petitioners purportedly seek to remedy – conflicted and/or inadequate defense of popularly-enacted legislation – is already expressly envisioned and protected against by the current, well-settled rule. *See Sagebrush Rebellion*, 713 F.2d at 528-29 (approving intervention as defendant by advocacy group where legitimate concern existed about the likelihood of zealous advocacy by a government defendant who had been director of the legal foundation representing the plaintiff prior to his appointment as Secretary of the Interior); *compare League of Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305-07 (9th Cir. 1997) (distinguishing *Sagebrush Rebellion* and noting that then-California Governor Pete Wilson – a staunch advocate of the ballot-measure there at issue – was well-qualified to supervise its constitutional defense).

member of every state's government is categorically unable to defend *any piece of ballot-enacted legislation*. This Court should reject Petitioners' invitation to discard the fundamental presumption that elected government officials can, at least in many instances, both defend and enforce the laws of their states.

III. The "Direct and Dramatic" Inter-Circuit Conflict Petitioners Claim to Identify Does Not Exist.

For all their efforts to manufacture a "direct and dramatic [inter-Circuit] conflict . . . of major national significance", Pet. at 17, Petitioners manage to cite only a single Ninth Circuit opinion holding that a ballot-initiative sponsor was entitled to intervene as of right in post-enactment litigation challenging a measure it had supported.[9] That opinion,

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[9] In an effort to imply that the Sixth Circuit's own law is somehow unsettled, Petitioners suggest that *Northland* and the opinion below depart from *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). As both the courts below recognized, no such conflict exists. In *Miller*, the Sixth Circuit allowed the Michigan Chamber of Commerce to intervene in litigation challenging newly-enacted state campaign finance laws. But as the Sixth Circuit has now repeatedly explained, *Miller* is distinguishable because the intervening party was "an entity also regulated by at least three of the four statutory provisions challenged" in the litigation. *Id.* at 1247. *See also Northland*, 487 F.3d at 345 (pointing out that pro-life advocacy organization that had sponsored citizen-initiative process, unlike the Chamber of Commerce in *Miller*, was "not itself regulated by any of the statutory provisions at issue here"); *see also Coalition*, 501 F.3d 782. The district court distinguished *Miller* on the same grounds. *Coalition*, 240 F.R.D. at 375.

Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), contains virtually no discussion of the rule it announces – which was arguably *dicta* in any event, since the same opinion simultaneously affirmed a judgment on the merits identical to that sought by the putative intervenors. *Spellman*'s entire "analysis" of this issue is as follows:

> "Denial of [the initiative sponsor's] motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972). [T]he public interest group that sponsored the initiative[] was entitled to intervention as a matter of right under Rule 24(a). However, while we sustain [the proposed intervenor's] appeal, this reversal does not require a new trial because the holding of the case would not be changed."

Id. at 629-30. The opinion contains no other discussion of the intervention issue.

Petitioners' other cases from the Ninth Circuit do not concern intervention by ballot-initiative sponsors and therefore are inapposite. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) (allowing intervention by state and county in suit to enjoin implementation of certain logging regulations); *Sagebrush Rebellion* 713 F.2d at 525 (allowing intervention by Audubon Society and certain other entities in challenge to

regulatory action by the Department of the Interior); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (allowing intervention by women's rights organization in legal challenge to procedures for ratifying the Equal Rights Amendment). Notably, *Forest Conservation Council*, *Sagebrush Rebellion* and *Freeman* all involved challenges to rulemaking or ratification *procedures* – none involved a challenge to the validity of a law or regulation as enacted. *Id.*

In fact, other cases from the Ninth Circuit – not cited in the petition – *deny* intervention to initiative sponsors in Petitioners' circumstances, consistent with the result below. *Wilson*, 131 F.3d at 1297 (affirming denial of intervention by sponsors of initiative intended to deny government benefits to undocumented immigrants); *see also Prete*, 438 F.3d at 959-60 (holding that grant of intervention to sponsor and supporter of Oregon ballot initiative was erroneous but, under the circumstances, harmless). The present action is plainly an inappropriate vehicle for resolution of any inconsistency within Ninth Circuit caselaw. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (holding that "doubt about the respect to be accorded to a previous decision of a different panel [of the same Court of Appeals] should not be the occasion" for a writ of *certiorari*).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

June 11, 2008

Respectfully Submitted,

/S/ Mark D. Rosenbaum

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERRELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY RED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants

and

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD

Case No. 2:06-CV-15024

Hon. David M. Lawson

OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

_____/

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ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

NOW COMES Attorney General Michael A. Cox, by his attorneys, Margaret A. Nelson, Heather S. Meingast, and Joseph E. Potchen, Assistant Attorneys General, and in support of his motion to intervene states as follows:

1. On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2. The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate.

2. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.

3. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

4. The Defendant Universities then filed their cross claim on December 11, 2006. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[1]

5. The Universities assert they have already begun both their admissions and financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as

[1] See Const 1963, art 12, § 2 providing for the effective date of § 26.

applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions.

6. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

7. The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

8. On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[2] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now Const 1963, art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned legal team. (See Exhibit 1) Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

[2] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

9. In acknowledgement of a legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

10. These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

11. Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) *when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.*
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) *when an applicant's claim or defense and the main action have a question of law or fact in common.* When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Emphasis added.]

12. Again the Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when

those laws are challenged.[3] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[4]

13. The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

14. The United States Court of Appeals for the Sixth Circuit recognized in *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* that the Attorney General has broad authority to intervene in matters affecting the public's interests, and that he should only be prohibited from doing so when it would prove inimical to the public interest.[5] In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[6] The Court concluded that the State's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter.[7]

15. The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal

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[3] Const 1963, art 5, §§ 3, 21; MCL 14.28.
[4] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).
[5] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).
[6] *Associated Builders*, 115 F3d at 390.
[7] *Associated Builders*, 115 F3d at 390-392.

and Governor Granholm remains an active party to the suit, it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation.

16. The Attorney General should thus be allowed to intervene as a matter of right in this case under FR Civ P 24(a) to ensure that the State's interests are adequately presented via a vigorous defense of the constitutionality of § 26.

17. Alternatively, the Attorney General should be permitted to intervene under FR Civ P 24(b) because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties as required by the rule. His motion is timely and permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase. Accordingly, intervention should be granted in accordance with FR Civ P 24(b).

18. Under LR 7.1(a), Attorney General Cox has sought concurrence in the motion to intervene from all counsel to the parties in this action. The Governor does not oppose the Attorney General's intervention. Counsel for the Universities was unable to respond before speaking with his clients. Counsel for the Plaintiffs does not oppose the Attorney General's intervention.

WHEREFORE, for the reasons set forth above and in the accompanying brief, Attorney General Michael A. Cox requests that this Court grant his Motion to Intervene pursuant to Fed R Civ P 24(a) and (b).

ATTORNEY GENERAL MICHAEL A. COX'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

CONCISE STATEMENT OF ISSUE PRESENTED

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. Should this Court therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry, 115 F3d 386 (CA 6, 1997)

Attorney General v Public Service Comm, 243 Mich App 487, 496-497; 625 NW2d 16 (2000)

Jordan v Michigan Conference of Teamsters Welfare Fund, 207 F3d 854, 863 (CA 6, 2000)

Linton v Commissioner of Health & Env't, 973 F2d 1311, 1319 (CA 6, 1992)

Michigan State v Miller, 103 F3d 1240, 1248 (CA 6, 1997)

Michigan State AFL-CIO v Miller, 103 F3d 1240, 1245 (CA 6, 1997)

Providence Baptist Church v Hillandale Comm, Ltd., 425 F3d 309, 313 (CA 6, 2005)

Stupak-Thrall v Glickman, 226 F3d 467, 471 (CA 6, 2000)

United States v Michigan, 424 F3d 438, 443-444 (CA 6, 2005)

STATEMENT OF THE FACTS

On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2.[8] The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

On December 11, 2006, the defendant Universities filed a cross claim with this Court against defendant Governor Granholm seeking declaratory and injunctive relief. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[9] The Universities assert they have already begun both their admissions and

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[8] The amendment passed overwhelmingly on November 7, 2006, with 2,141,010 citizens voting in favor of the proposal, and 1,555,691 citizens voting against the proposal, or by 57.9 % to 42.1%. See http://miboecfr.nictusa.com/election/results/06GEN/90000002.html.

[9] See Const 1963, art 12, § 2 providing for the effective date of § 26.

financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[10] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned

[10] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

legal team. Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

In acknowledgement of the legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

ARGUMENT

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. This Court should therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim.

A. Standard of Review

The decision whether to grant a motion to intervene lies within the discretion of the district court.[11]

B. The Attorney General should be allowed to intervene as of right under FR Civ 24(a).

Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Four criteria must be met for intervention as a matter of right: (1) the application is timely; (2) the party must have a substantial legal interest in the case; (3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and (4) there must be inadequate representation of that interest by the current party.[12] If any of

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[11] *Providence Baptist Church v Hillandale Comm, Ltd.*, 425 F3d 309, 313 (CA 6, 2005).
[12] See *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997).

these criteria are not satisfied, a motion to intervene must be denied.[13] The Sixth Circuit has adopted a "rather expansive notion of the interest sufficient to invoke intervention."[14]

A proposed intervenor's burden in showing inadequate representation of its interests is minimal.[15] A showing of possible inadequate representation is sufficient to meet such burden.[16] Despite such a minimal burden, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit."[17] The Sixth Circuit has adopted a three-part test to determine if the existing parties adequately represent the interests of a proposed intervenor.[18] The Sixth Circuit has held that a movant fails to meet his burden of demonstrating inadequate representation when (1) no collusion is shown between the existing party and the opposition; (2) the existing party does not have any interests adverse to the intervenor; and (3) the existing party has not failed in the fulfillment of its duty.[19]

In reviewing these factors, it is apparent that the Attorney General's motion to intervene is timely filed as the present lawsuit is in its initial phase. Moreover, the Attorney General has a substantial legal interest in this matter that will not be adequately represented by the existing parties. The Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when those laws are

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[13] *Stupak-Thrall v Glickman*, 226 F3d 467, 471 (CA 6, 2000).
[14] *Michigan State AFL-CIO*, 103 F3d at 1245.
[15] *Linton v Commissioner of Health & Env't*, 973 F2d 1311, 1319 (CA 6, 1992).
[16] *Linton*, 973 F2d at 1319.
[17] *United States v. Michigan*, 424 F3d 438, 443-444 (CA 6, 2005).
[18] *Jordan v Michigan Conference of Teamsters Welfare Fund*, 207 F3d 854, 863 (CA 6, 2000).
[19] *Jordan*, 207 F3d at 863.

challenged.[20] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[21] The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

In *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* the United States Court of Appeals for the Sixth Circuit recognized the Attorney General's broad authority and duty to represent the interests of the State [22]:

> In *Michigan ex rel. Kelley v CR Equipment Sales, Inc*, 898 F Supp 509, 513-14 (WD Mich 1995), District Judge Benjamin Gibson, discussing the same Attorney General involved in the instant case, said:
>
> "Michigan's Attorney General has broad authority to prosecute actions when to do so is in the interest of the state. First, Michigan statutory law provides as follows:
>
> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party ... and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested. Mich. Comp. Laws Ann. § 14.28 (West 1994). In addition, 'the attorney general has a wide range of powers at common law.' *Mundy v McDonald*, 216 Mich 444, 450; 185 NW 877 (1921). Thus, the Attorney General 'has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed.' *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789; 262 NW2d 676, 677 (1977)(citations omitted); see also *Mundy*, 216 Mich at 450, 185 NW 877 (Attorney General has broad discretion 'in determining what matters may, or may not, be of interest to the people generally.').
>
> The Court should only prohibit the Attorney General from intervening or bringing an action when to do so 'is clearly inimical to the public interest.' *In re*

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[20] Const 1963, art 5, §§ 3, 21; MCL 14.28.

[21] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).

[22] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).

> *Intervention of Attorney Gen.*, 326 Mich 213; 40 NW2d 124, 126 (1949) (citation omitted); see also *Michigan State Chiropractic Ass'n*, 262 NW2d at 677. Although a procedural distinction exists between intervention and initiating an action, 'there is merger of purpose, by reason of public policy, when the interests of the State call for action by its chief law officer and there is no express legislative restriction to the contrary.' *In re Lewis' Estate*, 287 Mich. 179, 184, 283 N.W. 21 (1938)." See also *Humphrey v Kleinhardt*, 157 FRD 404, 405 (WD Mich 1994).

In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[23] The Court concluded that the state's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter[24]:

> The existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal. Where such uncertainty exists, one whose interests have been affected adversely by a district court's decision should be entitled to "receive the protection of appellate review." A failure to seek such protection may constitute inadequate representation warranting intervention. "Although diligent prosecution may not require an appeal in every case . . . appeal . . . should be liberally granted where the judgment of the trial court raises substantial and important questions of law in relation to its correctness."
>
> * * *
>
> [The Attorney General's] burden of demonstrating inadequacy of representation was minimal, not heavy. Unlike the questionable status of the Electrical Contractors' Association in *Perry I*, [the Attorney General], representing the State of Michigan, has standing to argue the question of ERISA preemption of a state statute.

The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal and Governor

[23] *Associated Builders*, 115 F3d at 390.
[24] *Associated Builders*, 115 F3d at 390-392.

Granholm remains an active party to the suit. it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation given the conflict in legal positions. Although there is no apparent collusion between the Governor and the plaintiffs or the Universities as cross plaintiffs, it is expected that the Governor's legal position will more closely align with the positions asserted by the plaintiffs and cross plaintiffs in this case. Under these circumstances, the Attorney General has met his minimal burden of showing possible – if not probable – inadequate representation in the defense of the constitutionality of § 26 without his intervention. Indeed, Governor Granholm has acknowledged the conflict between the respective positions, and does not oppose the Attorney General's intervention. For these reasons, this Court should exercise its discretion and allow the Attorney General to intervene as of right.

C. **Alternatively, the Attorney General should be permitted to intervene under FR Civ 24(b).**

Federal Rule of Civil Procedure 24, states:

> b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the

Should this Court determine that the Attorney General is not entitled to intervene as of right, he asks that this Court permit him to intervene under FR Civ P 24(b). Again, the Attorney General's motion is timely since this lawsuit is in its infancy. In addition, the Attorney General's defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and

original parties as required by the rule.[25] Finally, permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase and no substantive proceedings have taken place. Accordingly, the Attorney General should permitted to intervene in accordance with FR Civ P 24(b).

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above and in the accompanying motion, Attorney General Michael A. Cox respectfully requests that this Court exercise its discretion and grant his motion to intervene in the complaint and cross claim filed in this matter pursuant to either FR Civ P 24(a) or (b).

Respectfully submitted.

Michael A. Cox
Attorney General

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Dated: December 14, 2006

[25] See, e.g. *Michigan State v Miller*, 103 F3d 1240, 1248 (CA 6, 1997), where the Sixth Circuit concluded that the Michigan Chamber of Commerce should have been permitted to intervene in a lawsuit challenging the constitutionality of state campaign finance laws because "[t]he Chamber's claim that the 1994 amendments are valid presents a question of law common to the main action."

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the following: **ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES WITH BRIEF IN SUPPORT**

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No. 07-1182

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION; and COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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Petitioners Michigan Civil Rights Initiative Committee (MCRIC) and American Civil Rights Foundation (ACRF) respectfully file this reply to the Briefs in Opposition filed by Respondents Chase Cantrell, et al. (Cantrell Opp.) and Regents of the University of Michigan, et al. (Regents Opp.).

INTRODUCTION

The Briefs in Opposition argue that review by this Court is unwarranted because the analysis of Federal Rule of Civil Procedure 24(a)(2) by the Sixth Circuit Court of Appeals is correct, even though it followed a recent decision that "altered the Rule 24(a) landscape." Petitioners' Appendix (App.) A-25 (Kennedy, C.J., concurring in part and dissenting in part). In so arguing, the Briefs in Opposition disclaim the direct conflict between the Ninth and Sixth Circuits on whether drafters and sponsors of citizen initiatives, who have expended time, effort, and money in supporting and defending their initiatives in pre-election challenges, should be permitted to intervene as of right under Rule 24(a)(2) to defend the newly adopted laws when those laws are challenged in post-election lawsuits.

The issues that must be decided in this case are (1) whether drafters and supporters of citizen initiatives have sufficient interest in the action to permit them to intervene as of right in post-election litigation when the outcome of that litigation may invalidate the newly adopted law; and (2) when citizens resort to the initiative process to adopt new laws prohibiting the state and its political subdivisions from taking certain actions, whether there is a conclusive presumption that the government cannot adequately defend the citizen initiative in post-election

challenges, thereby authorizing drafters and sponsors of citizen initiatives to intervene as of right.

The Briefs in Opposition distort the reach of MCRIC's and ACRF's Petition by asserting that the Petitioners seek a "wholesale replacement" of Rule 24(a)(2). Cantrell Opp. at 3. To the contrary, Petitioners seek only a conclusive presumption that the primary drafters and sponsors of citizen initiatives have an interest in the outcome of litigation challenging their measure's validity that is sufficient to allow the group to intervene in such litigation as a matter of right; and that when the newly adopted law prohibits certain types of actions by the state and its political subdivisions there is a corresponding conclusive presumption that the government cannot adequately defend the citizen initiative.

I

THE DIRECT CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE NINTH CIRCUIT CANNOT BE MINIMIZED OR IGNORED

The majority opinion of the Sixth Circuit departs radically from established Rule 24(a) jurisprudence, which includes cases from this Court, the Ninth Circuit, and earlier Sixth Circuit cases. *Coalition to Defend Affirmative Action, et al. v. Granholm, et al.*, App. A-25. The majority opinion below recognized expressly the inter-circuit conflict by noting that Petitioners' bid for intervention was supported by "several Ninth Circuit decisions," but determining that "our precedent requires a contrary conclusion." App. A-15.

In particular, the decision below directly conflicts with the Ninth Circuit cases of *Prete v. Bradbury*,

438 F.3d 949 (9th Cir. 2006), *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983), and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983). Nevertheless, the Briefs in Opposition argue that no such conflict exists, and the Sixth Circuit opinion is consistent with Ninth Circuit precedent in finding that drafters and sponsors of citizen initiatives do not have a substantial legal interest in defending their initiative in post-election challenges. Cantrell Opp. at 12-14; Regents Opp. at 8-11.

As was pointed out in the Petition, it is well settled in the Ninth Circuit that drafters and sponsors of citizen initiatives have an interest in defending that initiative. "DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." *Spellman*, 684 F.2d at 630. This was the position of the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), and *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), and remained the jurisprudence of the Sixth Circuit until 2007 when it handed down the decision in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007).

The dissent below observed that the *Northland* decision "altered the Rule 24(a) landscape. Prior precedent was consistent in holding that 'interest' was to be construed liberally and 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" App. A-25 (Kennedy, C.J., concurring in part and dissenting in part).

The facts of *Northland* cannot be distinguished from those before the Ninth Circuit in *Spellman*, 684 F.2d at 629. Both cases involved a voter approved initiative. Both cases involved public interest groups that were intimately involved in the adoption of the measures. Both groups sought to intervene in constitutional challenges to the newly adopted laws. Yet, unlike the Sixth Circuit, the Ninth Circuit in *Spellman* recognized that citizen-group sponsors have a cognizable interest in defending that legislation. 684 F.2d at 629. Significantly, the citizen group in *Spellman* was *not* regulated by the initiative—a consideration the Sixth Circuit in *Northland* found to be critical in denying intervention as of right.

The Cantrell Respondents place too much reliance on *Prete*, 438 F.3d 949, in arguing that the interpretation of the substantial interest factor of Rule 24(a)(2) by the Ninth Circuit and Sixth Circuit is consistent. Cantrell Opp. at 14. In *Prete*, a citizen initiative added a provision to the Oregon Constitution regarding payment of electoral petition signature gatherers. *Id.* at 951-52. The plaintiffs challenged the measure as violating the First Amendment. The chief petitioner and main supporter moved to intervene and the Ninth Circuit reaffirmed that "for purposes of intervention as of right, a public interest group that has supported a measure (such as an initiative) has a 'significant protectable interest' in defending the legality of the measure." *Id.* at 954 (citation omitted).[1]

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[1] In *Prete*, the Ninth Circuit found that there was no evidence in the record to show that the government was unable to adequately defend the new campaign law. Here, in contrast, because Proposal 2 prohibits state actions, Petitioners believe that there is a conclusive presumption that government cannot adequately

(continued...)

The protectable legal interest in these cases arose from the mere fact that proposed intervenors were the sponsors of the citizen initiatives—irrespective of the economic/regulatory nature of the proponents' interests or substantive/procedural grounds for the challenge.

Likewise, the Cantrell Respondents read too much into this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).[1] Cantrell Opp. at 5. In *Arizonans for Official English*, this Court expressed "grave doubts" as to whether the proponents of a ballot initiative *had Article III standing to pursue appellate review* of a district court decision. 520 U.S. at 44. This is not an issue in this case.

Here, MCRIC and ACRF are simply attempting to intervene as defendants in a lawsuit that is challenging the constitutionality of a new law they drafted and sponsored. They are asking to be placed in the same position as the drafters and sponsors of citizen initiatives who seek to intervene in the Ninth Circuit, where it would be recognized that they have a substantial legal interest in Proposal 2's continued validity sufficient to merit intervention as of right. The direct and dramatic conflict between the Ninth and Sixth Circuits should be resolved by this Court.

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[1] (...continued)
defend the new law when it is challenged on constitutional grounds.

II

THE PRIMARY DRAFTERS AND SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO A CONCLUSIVE PRESUMPTION OF AN INTEREST IN ANY POST-ELECTION CHALLENGE TO THEIR MEASURE SUFFICIENT TO SUPPORT INTERVENTION AS OF RIGHT

The Cantrell Respondents fear the outcome of a rule that Petitioners do not advocate, asserting that "Petitioners do not identify *which* supporters of a ballot initiative should in their view have a *per se* right to intervene such litigation." Cantrell Opp. at 3. But Petitioners do not advocate a *per se* right to intervene. Rather, Petitioners urge that the existing presumption in favor of intervention take a specific form in the context of citizen instigated ballot initiatives. Petitioners assert that there should be a conclusive presumption that the primary drafters and sponsors responsible for an initiative measure being adopted by the electorate have a significant interest in the outcome of post-election litigation challenging the newly adopted law's validity, entitling them to intervene as of right. Once it is established that the applicants for intervention are the primary drafters and sponsor of the new law, such a rule disposes of but one of the four factors in the Rule 24(a)(2) analysis.

Second, the Cantrell Respondents aver to ACRF being an "out-of-state" organization that "is not an official ballot-question committee," and imply that ACRF is no different than any other advocacy group that has an interest in ballot-enacted legislation. Cantrell Opp. at 10. However, both the district court

and the Sixth Circuit have found otherwise. It is well within the district court's competency to distinguish between a group that merely supports a ballot measure and a group that drafts, sponsors, or otherwise is the primary reason for the measure being on the ballot and being adopted by the voters. And here, the district court did just that, finding that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without [ACRF's and MCRIC's] efforts." App. B-14. The Sixth Circuit acknowledged this finding, adding that "MCRI and the ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006, general election ballot and to see that the Michigan voters approved Proposal 2." App. A-15.

The drafters and sponsors of citizen initiatives possess unique expertise and knowledge concerning those measures that other potential intervenors lack. *See* Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 Colum. L. Rev. 157, 169 (1989) (comparing the expertise of the drafters of initiatives to that of professional legislators). Groups such as MCRIC and ACRF devote their time, effort, and money, often over an extensive period, researching and drafting the measures they sponsor, circulating petitions, placing the measure on the ballot, campaigning for their passage, and frequently supporting and defending their initiatives against pre-election legal challenges. Indeed, this special relationship to a successful ballot initiative may be recognized by the parties in post-election litigation challenging the validity of successful measures. Here, for example, although ACRF's and MCRIC's application for intervention was opposed by

Respondents, depositions were taken from officers of both organizations to examine the motives and intent underlying Proposal 2. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (citing to depositions of Connerly and Gratz taken by parties below, including the Cantrell Respondents).

Limiting the presumption Petitioners advocate to such groups would ensure that those with the greatest expertise, knowledge, and commitment to newly adopted initiatives would not be denied intervention of right because of an allegedly insufficient legal interest in the outcome of post-election challenges to their measures. But it would not, as the Cantrell Respondents warn, "constitute a blanket license for virtually any advocacy group to inject itself into litigation addressing ballot-enacted legislation of concern to them." Cantrell Opp. at 10.[2]

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[2] Neither would such a rule have any applicability to popular referenda, as intimated by the Cantrell Opp. at 11-12. The referendum power refers to the right of the electorate to endorse or nullify laws recently enacted by the Legislature. This is wholly distinct from the initiative process, by which the people are enabled to draft and enact laws of their own choosing. *See Rossi v. Brown*, 889 P.2d 557, 560-63 (Cal. 1995). Only citizen initiatives are at issue in the present case.

III

THERE SHOULD BE A CORRESPONDING PRESUMPTION THAT A STATE OFFICIAL CANNOT ADEQUATELY REPRESENT THE INTERESTS OF DRAFTERS AND SPONSORS OF A CITIZEN INITIATIVE THAT WOULD BE ENFORCED AGAINST THE STATE AND ITS POLITICAL SUBDIVISIONS

Respondents argue that the adequacy of the Michigan Attorney General's representation of Petitioners' interests should be determined, *ex post*, by the success of his pursuit of summary judgment in the ongoing litigation over the validity of Proposal 2. *See* Regents Opp. at 16; Cantrell Opp. at 9. These arguments are misguided. The test for adequate representation for purposes of Rule 24(a)(2) must be applied *ex ante*, based on whether there is a possibility that the representation of a proposed intervenors' interest by the existing parties *may be* inadequate. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

In the present case, Petitioners easily met their "minimal burden" of establishing that their representation by an official of the State of Michigan—against whom Proposal 2 would be enforced—might well be inadequate. *See* Petition for Writ of Certiorari (Petition) at 17-24. The Attorney General's immediate acquiesence in an injunction suspending the enforcement of Proposal 2 against the University Defendants, App. B-5, defending the stipulation, and his failure immediately and vigorously to oppose the Cantrell Respondents' motion to alter or

amend the order of summary judgment currently pending in the district court[3] amply demonstrate the reasonableness of Petitioners' concerns.

The Cantrell Respondents complain that Petitioners "conflate" the adequacy of the state's representation of their interest in maintaining the legality of Proposal 2, with the substantiality of that interest itself. Cantrell Opp. at 7. As was pointed out in the Petition, however, the Sixth Circuit was unanimous on this very point: *both* the majority and the dissent reasoned that the substantiality of Petitioners' interest in intervening under Rule 24(a)(2) was virtually coterminous with the adequacy of the Attorney General's representation of that interest. *See* Petition at 18-19. This is no more than a recognition that the two substantive elements of Rule 24(a)(2) "often are very interrelated and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship." 7C Charles Alan Wright, et al., *Federal Practice & Procedure* 297 (2007).

It is undoubtedly true, as the Cantrell Respondents aver, that "elected government officials can, at least in many instances, both defend and enforce the laws of their states." Cantrell Opp. at 12. But such a truism sheds little light on the institutional capacity of such officials to vigorously represent the interests of citizens who have sought, through the initiative process, to implement measures limiting the discretion and authority of those very officials.

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[3] *See Coal. to Defend Affirmative Action, et al. v. Granholm, et al.*, No. 2:06-CV-15024-DML-RSW, Docket No. 253 (E.D. Mich. filed Apr. 1, 2008).

Potential inadequacy of representation in such cases may be inferred when "the intervenor offers a perspective which differs materially" from the public official charged with representing the interests of the proposed intervenor. *Sagebrush Rebellion*, 713 F.2d at 528. Yet, "the very act of resorting to a ballot initiative indicates a rift between the initiative's proponents and voters and their elected officials on the issue that underlies the initiative." *Bates v. Jones*, 904 F. Supp. 1080, 1087 (N.D. Cal. 1995). It defies reason and obviates the democratic principles underlying the initiative process to presume that state officials will vigorously and wholeheartedly reverse their nature the morning after election day, to suddenly become the champions of the political outsiders who fought a long and sometimes bitter campaign to limit the authority of those very officials.

Employing a conclusive presumption of inadequate representation by state officials in this class of cases would not, as the Cantrell Respondents assert, amount to "the wholesale replacement of the intervention inquiry under Rule 24(a)(2)" or the creation of "an unnecessary and counterproductive *per se* rule." Cantrell Opp. at 3. Rather, the conclusive presumption Petitioners advocate would recognize and embody the fundamental democratic principle of the initiative process: "to enable citizens to enact public policy directly and, in so doing, to overturn the dominion of interest groups and of state and local party machines." Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. Cal. L. Rev. 949, 949 (2005).

Petitioners do not argue that "every member of every state's government is categorically unable to

defend any piece of ballot-enacted legislation." Cantrell Opp. at 12. Rather, Petitioners maintain that when an initiative has been adopted by the electorate, and that initiative is to be enforced against the state itself, there should be a conclusive presumption that state agents cannot adequately represent the interest of the initiative's drafters and sponsors in post-election litigation over the validity of the initiative they brought into being.

IV

THE REMAINING CRITERIA FOR INTERVENTION AS OF RIGHT UNDER RULE 24(a)(2) HAVE BEEN MET IN THIS CASE

The Regent Respondents claim that even if Petitioners had substantial legal interests in the outcome of this litigation, Petitioners' motion was untimely (Regents Opp. at 12-13). The record in this matter is sufficient to establish that the district court abused its discretion as to the timeliness of Petitioners' motion.

In his dissent below, Judge Kennedy noted that the district court's finding that Petitioners' motion to intervene was untimely constituted an abuse of discretion. *See* App. at A-30. The fact that two motions to intervene were filed with the district court the same day, one of which was granted (the Attorney General's) and the other one of which was deemed untimely (the Petitioners'), cannot be explained or justified by any principle of law or logic. It is a patent abuse of discretion.

CONCLUSION

Because this case offers an opportunity for the Court to provide needed guidance on important questions of federal law, the Petition for Writ of Certiorari should be granted.

DATED: June, 2008.

Respectfully submitted,

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(1) MOTION FILED
APR 17 2008

(2)

No. 07-1182

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR CITIZENS IN CHARGE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Citizens in Charge ("CIC") hereby respectfully moves for leave to file a brief amicus curiae in this case in support of Petitioners, as provided under Rule 37 of the Rules of this Court. The consent of counsel for all parties has been timely requested and, with the single exception of Defendant-Respondents Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University, has been obtained. CIC has no parent or publicly-held company owning 10% or more of the corporation's stock.

CIC is a non-profit 501(c)(4) advocacy group that seeks to protect and expand the initiative and referendum rights of citizens, in Michigan and across the country. It believes in maintaining citizen control of government. CIC works with activists, legislators, media, opinion leaders and voters to protect the initiative and referendum process in states where it is enjoyed by the people, and to expand the process to states where voters currently lack these rights. CIC educates the public on the benefits of these rights and also litigates to protect and expand them.

While CIC does not take stands on particular ballot issues, it does assist groups who wish to exercise their direct democracy rights. The initiative right is often the only avenue for citizen-activists to enact laws which limit government. It is crucial to the initiative right that, after having sacrificed their time, resources, and labor to secure popular approval of a measure, sponsors are able to defend the

initiative from court challenges launched by the very foes they had just vanquished at the ballot box. In most, if not all, cases this final effort cannot be left to state government. Indeed, citizens resort to the initiative process precisely because the goals they support are ignored by political elites who control state government. CIC is dedicated to ensuring that the people continue to have access to the initiative right, and thus has a keen interest in the issues posed in this litigation.

Petitioners have focused on the particular facts of their case and this particular initiative. CIC, as a long-time advocate of initiative rights, would like to provide the Court with its perspective. The attached brief contains an overview of initiative and similar rights as they fit in the political process, often as a last resort for ordinary citizens to have their voices heard in a complicated political world of big government and special interests. In particular, many citizens advocate for political change through the initiative process even though the laws they seek to pass will provide them with no direct economic or regulatory benefit. It is this political and ideological interest, not merely the desire for material gain, that motivates many initiative proponents to sacrifice their labor, money, and time with their family to pass new laws.

The brief also includes an extensive discussion of how the courts have traditionally afforded initiative sponsors (and others directly involved in the passage of a law or regulation) the right to intervene in court challenges to the laws they were responsible for getting to the people. Finally, the brief addresses recent developments in Sixth Circuit case law, notably the decision in the case at hand,

which threaten to erode the important rights available to citizens in half the states to make their voices heard through the initiate and referendum process. CIC believes that its proposed brief will assist the Court in analyzing the issues presented in this case, and hopes that the Court will agree to consider its brief in deciding Petitioners' Petition for Certiorari.

CONCLUSION

For the foregoing reasons, CIC respectfully requests that the Court grant it permission to file its attached brief amicus curiae in this case.

Respectfully submitted,

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BRIEF FOR CITIZENS IN CHARGE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

The interest of Citizens in Charge is described in its motion for leave to file this brief in support of Petitioners.[1]

SUMMARY OF ARGUMENT

The initiative process reserves the people's right to enact laws directly when their elected representatives refuse to do so. Initiative sponsors devote considerable resources to their causes – sometimes against all economic logic. In most cases, the laws they advocate do not benefit them directly. Sponsors suffer the considerable financial, emotional, and social costs of promoting an initiative simply because they are committed to a political principle. The morning after the votes are counted, such citizen-activists must explain to their long-suffering families that their hard-fought electoral victory is "merely" the victory of a political idea – not some financial or legally protectable interest that will accrue to the family.

In appreciation of this reality, many courts have held that initiative sponsors (and others who have been instrumental in the passage of laws) are entitled to intervene in cases challenging the laws they labored to pass. In circumstances such as this,

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[1] All parties have consented to the filing of this brief, except for the University Defendant-Respondents. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

This brief was prepared entirely by amicus curiae, with no contribution of content or funds by any interested party or their counsel.

the Federal Rules of Civil Procedure allow parties to intervene in pending litigation, upon timely motion, if they "claim an interest relating to the property or transaction that is the subject of the action," the disposition of which "may as a practical matter impair or impede the movant's ability to protect its interest," unless "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

This rule is interpreted liberally to permit intervention by as many truly interested parties as due process and efficiency permits. (Of course, initiative sponsors are a finite group, so allowing their intervention does not encumber a litigation with too many parties – only the ones with the most at stake and the most to offer.) As to the interest required, the courts have stressed that this need not be a specific legal or equitable interest; the very efforts of initiative sponsors evidence their substantial interest in the resulting laws. Thus, prohibiting sponsors from intervening in such lawsuits – while the opponents of the laws are allowed to participate – is an affront to those citizens who have contributed their efforts to the political process. Moreover, it deprives courts of the unique arguments and advocacy of the very parties who cared enough about the measure to fight entrenched governmental and private interests for its passage. Several courts have observed that initiative advocates' expertise weighs in favor of intervention.

Once sponsors' unique interest in initiative litigation is established, the other elements required by Rule 24 flow naturally from the precedents of this Court and the Courts of Appeal, who agree that proposed intervenors face a minimal burden to show possible impairment of their interests and

inadequate representation by existing parties. Indeed, while would-be intervenors need only show that existing parties *may not* adequately represent their interests, in the initiative context there is typically an actual adversity of interests. In sum, the realities of the initiative process demonstrate that initiative sponsors should be entitled to intervene as of right. Their considerable sacrifices to pass initiatives that may not even directly benefit them evidences a political interest which, in a lawsuit challenging the law, may obviously be impaired, and government defendants clearly may not adequately represent the particularized interests of the official proponents of a law which the government itself failed to enact.

As the dissent below recognized, the Sixth Circuit's decision in this case turns traditional Rule 24(a) analysis on its head, requiring that an initiative sponsor be directly regulated by the law it promoted. This test second-guesses the political goals of initiative sponsors by assigning second-class status to those who dedicate their money, time, and efforts to political principles whose implementation will provide them no direct economic or regulatory benefit. For purposes of Rule 24, which seeks to bring together all substantial and unique interests in a litigation, this preference of economic and regulatory political interests over purely principled and ideological political interests is wholly inappropriate. It runs counter to the experience of 400 years of citizen activism on this continent, the intensity and ultimate success of which has not always depended on economic and regulatory grievances.

Allowing the Sixth Circuit's preference for material-based activism over principle-based activism to gain traction would not only discourage citizen initiatives, it would place courts in the dangerous and undemocratic role of deciding which political messages and speakers deserve to be taken seriously in the legal system and, by extension, the public square. This Court must restore order and right-thinking to Rule 24 jurisprudence.

ARGUMENT

I. The Initiative Process Allows Ordinary Citizens To Participate in the Political Process

About half the states reserve some form of initiative or referendum right. Initiative sponsors expend substantial time, energy and money to ensure that their proposal is placed before the people and that it becomes law. They are motivated not by some academic interest in observing a plebiscite, but by the desire to change the law of the land using perhaps the most democratically legitimate form of political action.

Likewise, initiative opponents work throughout the process not to ensure that state procedural and substantive requirements are met, but to ensure the initiative's defeat. As Petitioners point out, the sponsors and opponents of this particular initiative were involved in three separate lawsuits in state and federal court addressing various pre-ballot issues. Participation in such lawsuits is, of course, in addition to the other

expensive and time-consuming work involved in placing a proposed law before the voters, from preparing a petition to having the petition form approved, hiring signature gatherers, circulating the petition for signatures, having the petition and signatures approved, getting the ballot language approved, etc.

After voters approve an initiative, the process continues – the same opponents who fought the law throughout the pre-election phase can now challenge the law itself in the courts, as was done here. For many years, courts likewise permitted initiatives' sponsors to intervene as of right under Rule 24(a) so that they could continue to defend their proposals against challengers' attacks.

Recently, however, the Sixth Circuit fashioned a new test for intervention based on the political cause and motivation of citizen-proponents' activism. Unlike other Circuits, notably the Ninth, the Sixth Circuit no longer considers more objective and relevant intervention factors such as activists' demonstrated willingness to support a measure by acting as sponsors, or the ability of citizen-activists to articulate a unique interest in advocacy before the court. This has resulted in an irreconcilable split among the Circuits.

More importantly, however, it precludes principle-driven initiative sponsors from supporting a cause they have championed from the beginning, while allowing opponents to continue their attacks. The uncertainty created by this circuit split means that citizen-activist-sponsors around the country who are not motivated by any clear economic or regulatory interest will have little incentive to

champion a cause knowing that, even if their hard work pays off, they must forfeit their support of the measure during the "end-game" in the courts.

II. Rule 24(a) Permits Intervention of Right Under Traditionally Liberal Standards

As many federal courts have observed, "Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor." *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). *See also California ex rel. Lockyer v. United States*, 450 F.2d 436, 440 (9th Cir. 2006) (same); 59 Am. Jur. 2d *Parties* § 168 (same). Thus, "[e]ven if it could be said that the question raised is a close one, 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (citation omitted). Such "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (citation omitted).

A party is entitled to intervene under Rule 24(a) if the following test is met :

> (1) the applicant's motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that without intervention the

> disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the other parties.

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (citation omitted). *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (same). This test comes from the text of the rule itself. *See* Rule 24(a). These elements are often interrelated. 7C Fed. Prac. & Proc. Civ.3d § 1908 (2008) ("[I]t is important to note that [Rule 24(a)'s requirements] often are very interrelated and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship.").

The burden of establishing the third and fourth elements is minimal. As to the third: "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. ... This burden is minimal." *Miller*, 103 F.3d at 1247 (emphasis added). Similarly, the fourth factor – inadequate representation by an existing party – is easily shown. As this Court has stated, an applicant need only show that "representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).[2]

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[2] In fact, a 1966 amendment to the rule indicates that burden is now on the *opponent* of intervention to establish adequate representation. *See* 7C Fed. Prac. & Proc. Civ.3d § 1909 (2008)

III. Initiative Sponsors Have Historically Been Entitled to Intervention of Right

Under Rule 24(a) jurisprudence, a timely motion to intervene will be granted as long as the movant has a sufficient interest related to the subject of the litigation, and satisfies the minimal burdens of showing impairment and inadequate representation. Given the liberal construction accorded the rule, and sponsors' obvious interest in supporting their new law, courts have traditionally permitted sponsors to intervene of right in cases involving the subject of the initiative.

In the seminal case of *Washington State Building & Construction Trades Council, AFL-CIO v. Spellman*, the Ninth Circuit noted that Rule 24 "traditionally has received a liberal construction in favor of applicants for intervention." 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). Thus, it was clear to the court that the movant, "as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." 684 F.2d at 630. The Ninth

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("[I]t seems entirely clear that the effect of this change is to shift the burden of persuasion. Before the amendment the intervenor had to satisfy the court that representation was or might be inadequate. Although some courts seem to continue to follow this approach, ... the language of the rule clearly suggests that now the intervenor is to be allowed in, if the other conditions of the rule are satisfied, unless the court is persuaded that the representation is in fact adequate.").

Circuit apparently recognized the issue to be so clear as to warrant little discussion.

A. Initiative Sponsors Plainly Have a Sufficient Interest, Which May Be Impaired, to Justify Intervention of Right

Over the years, the Ninth Circuit (and other courts) have allowed intervention where the movant was directly involved in the enactment of the law being challenged. The courts have had little difficulty in finding that such parties satisfied the second and third elements required for intervention. For example, in *Sagebrush Rebellion*, the Ninth Circuit held that it was error to deny intervention to the National Audubon Society in a suit challenging the government's creation of a bird of prey conservation area. The Society was a non-profit organization "devoted to the protection of birds and other animals and their habitats," and had actively participated in the administrative process culminating in the establishment of the conservation area. 718 F.2d at 526-27.[3] The court concluded that "there can be no serious dispute in this case

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[3] Like *Sagebrush Rebellion*, several cases of note do not necessarily involve initiatives. Many cases have involved administrative proceedings. *See, e.g., Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001) ("[W]e find persuasive those opinions holding that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals."). In cases involving initiative sponsors, the case for intervention is even stronger as they are in a very real and direct way responsible for the law being challenged.

concerning either the timeliness of the motion to intervene or of the existence of a protectable interest on the part of the applicant which may, as a practical matter, be impaired. An adverse decision in this suit would impair the society's interest in the preservation of birds and their habitats." *Id.* at 528 (citing *Spellman*).

Other courts have easily concluded that the official sponsors of an initiative (and others in analogous situations) have sufficient interest to intervene. Conservation groups dedicated to the preservation of wildlife have been held to have a sufficient interest:

> A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported. ... ICL/CIHD have been active in the process [the Fish and Wildlife Service ("FWS")] went through to list the Springs Snail as an endangered species. The groups even filed a suit to compel FWS to make a final decision on the proposed listing rule. ICL/CIHD satisfy the interest requirement.
>
> Looking to the third requirement, we conclude that disposition in the present action would impair ICL/CIHD's ability to protect their interest in the Springs Snail and its habitat. The action could, and did, lead to a decision to remove the Springs Snail from the list of endangered species.

Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (footnote and citations omitted). *See also Coalition of Arizona, etc. v. Department of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) ("In sum, we hold that Dr. Silver's involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest in the listing of the Owl for the purpose of intervention as of right, even though Dr. Silver has little economic interest in the Owl itself. Additionally, Dr. Silver's interest in the Owl is legally protectable as evidenced by his successful effort to have the Owl protected as an endangered species under the Act.").

The interest in these cases arose from the fact that the proposed intervenor was the sponsor or supporter of the initiative (or other push for government action). The intensity – not the economic/regulatory nature – of proponents' interests was the critical factor: the cases have involved environmental protection, term limits, the use of English only in government, and other causes. *See, e.g., Prete v. Bradbury*, 438 F.3d 949, 955 (9th Cir. 2006) ("Here, Nesbitt was chief petitioner for the measure, and the Oregon AFL-CIO was a main supporter of the measure. Under the rule from *Sagebrush Rebellion*, intervenor-defendants thus have a 'significant protectable interest' related to this action, and an adverse judgment might impede or impair that interest."); *Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997) ("Unlike the other intervenors on the state's side, [movant] was not an official sponsor of the [term limits] initiative, and we see no reason to grant it intervenor status."); *Sportsmen for I-143 v. Montana Fifteenth Judicial District Court*, 308 Mont. 189, 194, 40 P.3d 400, 403 (2002) ("In this

case, the Sportsmen's Groups were the authors, sponsors, active supporters and defenders of [the initiative]. Accordingly, we conclude that the Sportsmen's Groups have a direct, substantial, legally protectable interest in the instant action challenging the interpretation of I-143, and, as such, they are entitled to intervene as a matter of right."); [4] *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000) ("If the initiative were declared unconstitutional, its enactment would obviously be vitiated and the efforts of [the] initiative committee members[] to enact a law requiring the use of English in government would be frustrated."). Unlike the Sixth Circuit, none of these courts second-guessed the rationality of or economic-material basis for the intervenors' support of the initiatives at issue; instead, they used an objective measure, like sponsorship of the measure, to determine the intensity of the intervenors' interest.

B. The Interests of Initiative Sponsors Clearly Are Not Adequately Represented by Government Parties

The courts have followed Supreme Court precedent that the movant's burden to show inadequate representation is "minimal," requiring only that they show such representation "may be" inadequate. *Sagebrush Rebellion*, 713 F.2d at 528 (citing *Trbovich*, 404 U.S. at 538 n.10). (Thus, it was not necessary to show any collusion or other conduct unfavorable to the intervenor's interests; indeed, in

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[4] As many states' rules follow the Federal Rules, their courts look to federal precedent.

Sagebrush Rebellion, the government had "continued professionally and diligently to defend" the actions. *Id.*) The court in *Sagebrush Rebellion* considered several factors in holding that this element was satisfied, including "whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Id.* The court also cited the fact that "[i]n addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation." *Id.* Thus, even where the government's position was not adverse to the intervenors', the courts ..have permitted intervention. *See also Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (interests of environmental organizations were not adequately represented by government in action to invalidate proclamation establishing national monument; even if government had vigorously represented interests of intervenors in defending creation of monument, it was not realistic to assume that government's programs would remain unaffected by unanticipated policy shifts); *Sportsmen for I-143*, 308 Mont. at 194-95, 40 P.3d at 403 (sponsors entitled to intervene where, *inter alia*, government defendant was "a political appointee and considering the ongoing political controversy surrounding the game farm issue"); *Kritz*, 3 P.3d at 914 ("Indeed, we believe that a sponsor's direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of adversity will ordinarily preclude courts from denying intervention as of right to a sponsoring group.").

In this case, and many others involving intervenors, it is beyond dispute that the government's defense of the law at issue is in fact inadequate. Often, the state defendants are openly hostile to the very law they purport to defend. *See, e.g., Babbitt*, 58 F.3d at 1398 ("FWS delayed its decision on the [endangered species] listing proposal for years and took action only after ICL/CIHD filed suit to compel FWS to make a decision. ... FWS was unlikely to argue on behalf of ICL/CIHD, the very organizations that compelled FWS to make a final decision by filing a lawsuit. FWS would not have adequately represented ICL/CIHD's interests."); *Kritz*, 3 P.3d at 913-14 (noting that the "Attorney General's Office questioned the constitutionality of the initiative" and "the governor personally opposed the measure publicly and unequivocally by stating that it was '"unnecessary, unfair and unfortunate"').

C. Initiative Sponsors Should Enjoy a Per Se Right to Intervene Under Rule 24(a)

Given the unique posture of initiative sponsors, in comparison with other prospective intervenors, they should enjoy an automatic right to intervene under Rule 24(a). Indeed, some courts have declared that there is a "per se" rule permitting initiative sponsors to intervene, acknowledging that a sponsor's right to intervene obviously flows from its particular interest in the measure it brought to the people for a vote. As the Ninth Circuit has stated, "there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to [Rule] 24(a)." *Yniguez v.*

State of Arizona, 939 F.2d 727, 733 (9th Cir. 1991).[5] *See also Bates v. Jones*, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995) ("The individualized interest of official proponents of ballot initiatives in defending the validity of the enactment they sponsored is sufficient to support intervention as of right.").

Indeed, the *Bates* court distinguished between the interests of official sponsors and mere "supporters" of the measure. *Id.* at 1086-87 ("These individualized interests are distinguishable from the general interest of supporters of term limits, however."). It explained that the interest of the official sponsors of the measure "in its continued validity could obviously be impaired in this litigation" and they would therefore be allowed to intervene if their interest was not adequately represented by other parties. The court added that "an official sponsor of a ballot initiative may be considered to add an element not covered by the government in defending the validity of the initiative in that the very act of resorting to a ballot initiative indicates a rift between the initiative's proponents and voters and their elected officials on the issue that underlies the initiative." *Id.* at 1087. A per se rule allowing intervention of right recognizes the important interest sponsors have as the result of

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[5] *Yniguez* involved a motion to intervene made *after* the district court declared the challenged law (declaring English to be the official state language) unconstitutional. The only defendant in the case, the Governor, who had publicly opposed the measure, announced she would not appeal the district court's order. *Id.* at 730. The sponsor sought to intervene in order to pursue the appeal itself, which the appellate court held would require the sponsor to satisfy Article III standing in addition to satisfying Rule 24(a). *Id.* at 731. That issue is not presented here.

their dedication to the issue, and provides the court the benefit of the sponsors' expertise and commitment.

IV. The Sixth Circuit Departs from Established Precedent, Holding that Initiative Sponsors Lack Sufficient Interest to Intervene in Support of Legislation Enacted Through their Efforts

A. Sixth Circuit Precedent on Intervention of Right

In 1997, the Sixth Circuit held that the Michigan Chamber of Commerce was entitled to intervene in a case challenging campaign finance legislation. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). Although this case did not involve an initiative, the court noted the Chamber had been active in the process leading to the legislation, analogizing the facts before it to those in the Ninth Circuit's *Babbitt* decision. *Id.* at 1246. Noting that the Circuit followed "a rather expansive notion of the interest sufficient to invoke intervention as of right," requiring less of a showing than the Article III standing required to commence a lawsuit, the court "'reject[ed] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Id.* at 1245. Observing that the inquiry was "necessarily fact-specific," *id.*, the court concluded that several facts supported intervention:

> The evidence shows that the Chamber was (1) a vital participant in

> the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.

Id. at 1246-47. *Cf. Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 316 (6th Cir. 2005) ("In short, there is a serious question as to whether Hillandale Committee is, in fact, the duly authorized committee which circulated the referendum petitions.' If it is not, it has no basis from which to claim a substantial legal interest in protecting the results of the referendum.").

The court in *Miller* went on to find that the minimal showings required for the impairment and inadequate representation elements were met. 103 F.3d at 1247-48. Significantly, the court pointed out that the Secretary of State had opted not to appeal a preliminary injunction entered in the case. The court explained:

> While passively tolerating a preliminary injunction pending a final resolution of the merits may serve the interests of the State of Michigan, it cannot be said to represent the Chamber's interests, in view of its concern with timeliness. The decision not to appeal certain aspects of

> the district court's preliminary injunction may amount to sound litigation strategy and a prudent allocation of Michigan taxpayers' money, but this decision also further illustrates how the interests of the state and of the Chamber diverge.

Id. at 1248. It is important to note that in the present case, not only did the government defendant "passively tolerat[e]" a preliminary injunction, it affirmatively agreed to it.

In 1999, the court followed *Miller* to permit intervention in a case challenging a university's race-based admissions policy. *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). The district court below had denied intervention to students and applicants for admission to the university as well as three "pro-affirmative action coalitions" and a non-profit organization "whose stated mission is to preserve opportunities for African-American and Latino/a students in Michigan." *Id.* at 397. On appeal, the Sixth Circuit held that the proposed intervenors all had sufficient interest, noting that this was an "expansive notion" that did not require a "specific legal or equitable interest." *Id.* at 398 (citations omitted). Noting that close cases should be resolved in favor of intervention, the court held that the proposed intervenors had stated a sufficient interest, "namely their interest in gaining admission to the University[.]" *Id.* at 399. (In concluding, the court did not specifically address the coalitions' or non-profit group's interests, but did hold that all proposed

intervenors could intervene.[6]) After finding that the intervenors also met the minimal burden of showing a possible impairment of their interest, the court criticized the district court's analysis of the inadequate representation issue, stressing that "the proposed intervenors were required only to show that the representation *might* be inadequate." *Id.* at 399-400 (emphasis in original).[7]

B. The Sixth Circuit Denies Initiative Sponsors the Right to Intervene Merely Because They Are Not Directly Regulated by the Resulting Law

The Sixth Circuit subsequently departed from the reasoning of the foregoing precedent, announcing a new test that creates two classes of political advocates: those who act out of economic and regulatory considerations, and those who act based on political principle.

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[6] The district court below noted that the non-profit group consisted of "'individuals, some of whom are parents or grandparents of prospective African-American and Latino students in the State of Michigan.'" *Gratz v. Bollinger*, 183 F.R.D. 209, 212 n.4 (E.D. Mich. 1989). The district court therefore concluded that "it would appear that the proposed student intervenors and the association share the same 'interest' in the preservation of race as a factor in determining admissions." *Id.*

[7] The court observed that "this circuit has declined to endorse a higher standard for inadequacy when a government entity is involved." *Id.* As the case law makes clear, such a higher standard is especially contraindicated where, as in this case, the government is defending an initiative measure.

As noted above, the *Miller* court remarked that, as one of four facts supporting a finding of interest, the intervenor was itself regulated by some of the provisions being challenged. 103 F.3d at 1247. In *Northland Family Planning Clinic, Inc. v. Cox*, the court inexplicably exaggerated the significance of this single factor. 487 F.3d 323 (6th Cir. 2007), *cert. denied.*, -- U.S. ---, 128 S. Ct. 872, 873 (2008). The court therefore denied intervention to STTOP, the committee formed to promote passage of the law being challenged. The court distinguished *Miller*, stating:

> Here, STTOP might share two of these four factors with the Chamber of Commerce, but clearly does not share the other two. Although STTOP was involved in the process that resulted in the passage of the challenged legislation, and might be adverse to the plaintiffs in the state's regulation of abortion practices, it is not a repeat player in litigation, as it was created for only one specific ballot initiative, and is not itself regulated by any of the statutory provisions at issue here. This fourth factor is particularly significant – unlike the Chamber of Commerce in *Miller*, STTOP has only an ideological interest in the litigation, and the lawsuit does not involve the regulation of STTOP's conduct in any respect. Thus, STOPP's case for intervention here is much weaker than that of the Chamber of Commerce in *Miller*.

487 F.3d at 344-45. The court's disproportionate focus on this one factor is not supported in prior precedent.[8] Nor does it make sense from a logical standpoint. The court stated that the group was "not a repeat player in litigation, as it was created for only one specific ballot initiative." However, the fact that the group was actually created to, and did, sponsor an initiative on the issue, with all the efforts that entails, indicates that the group's interest was more than merely ideological. This is precisely the type of effort which has led the Ninth Circuit and other courts to recognize the right of initiative sponsors to intervene in cases challenging the resulting legislation.

In the present case, the Sixth Circuit unaccountably elevated the *Miller* court's reference to a single relevant fact – direct regulation by the resulting law – to a prerequisite for intervention. *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007). Petitioners argued to

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[8] The court attempted to draw what it called a "useful distinction" between cases challenging the procedure required to pass a law (in which intervention would be appropriate) and those challenging the government's subsequent enforcement of the rule or law after its enactment. *Id.* at 345. However, most examples cited by the court were in fact post-enactment challenges. The courts have not drawn distinctions based on the type of challenge to laws enacted through the initiative process; they have simply held that in the face of such a challenge, on whatever grounds, the sponsor or supporter may intervene. *See, e.g., Spellman*, 684 F.2d at 629-30 (in action challenging constitutionality of statute, sponsor entitled to intervene as matter of right); *Babbitt*, 58 F.3d at 1397 (groups entitled to intervene in action challenging rule on basis rule was arbitrary and capricious because defendant committed procedural errors).

the Sixth Circuit that "as groups substantially involved in the process leading to the adoption of the challenged amendment, they have a legal interest in the subject matter of this lawsuit," relying on the court's prior decisions in *Grutter* and *Miller*, as well as Ninth Circuit law that the court had cited in the past. *Id.* at 780. Nonetheless, the court held that under *Northland Family Planning*, which it found dispositive, "an organization involved in the process leading to the adoption of a challenged law[] does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, *unless the challenged law regulates the organization or its members.*" *Id.* at 781 (emphasis added). Although this conclusory statement mischaracterizes the court's prior opinion, in which it referred to this factor as "particularly significant," 487 F.3d at 345, rather than a strict precondition for intervention, it confirms that the Sixth Circuit has fashioned a new test at odds with that of the Ninth.

Indeed, the dissent below criticized the court's reliance on *Northland Family Planning* because that opinion "fundamentally altered the Rule 24(a) landscape" and ignored the basis for the prior holdings of the Sixth and Ninth Circuits. 501 F.3d at 785 (Kennedy, J., concurring and dissenting in part); *see also id.* at 785 n.1 (adding that the holding may well be dicta). Prior case law simply did not require that a proposed intervenor be subject to the law it sponsored in order to support intervention. As the dissent below noted, in the *Spellman* case "[t]he public interest group was not regulated by the initiative, which the majority concludes is critical here[.]" *Id.*

The dissent also stressed a reality which the majority below ignored:

> When the government has passed a law, it can be trusted to administer it. When, as here, however, government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

Id. at 786 (emphasis in original). The dissent further observed that, as in many cases where the people are forced to resort to the initiative, there was an objective basis for the intervenors' fear that the government could not be relied upon to defend the law. *See id.* at 786 ("[T]he Attorney General and the Governor have already compromised with the plaintiffs and the cross-claimants in this case and stipulated to an injunction that, we have previously found, had no basis in federal law. In addition, [before the election] the Governor opposed [the amendment].").

The dissent correctly concluded:

> All of this reinforces concern with entrusting the "public interest in enforceability" of a general election, voter-approved measure to elected officials. As the example of the Governor proves, there are cases in which the elected officials of a state will disagree with the majority of the voting population on a particular point of

> public policy. Therefore, when the voters demonstrate their preference on that point of public policy through the constitutional amendment process, it follows that some representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in *Spellman* that the sponsor of the measure should be that representative.

Id. at 786-87.

As the dissent recognized, the majority decision turns traditional Rule 24(a) analysis on its head, requiring an initiative sponsor to actually be directly regulated by the law it promoted. But as discussed above, the majority's new rule is grounded in a political philosophy that prefers some types of political advocacy over others: "legitimate" advocacy that is based on some material or economic interest is preferred and its proponents are welcomed in the federal courts, while advocacy that is based on principle, without any specific economic or regulatory interest, is devalued. Federal courts effectively "second-guess" the motivations of principle-based advocates.

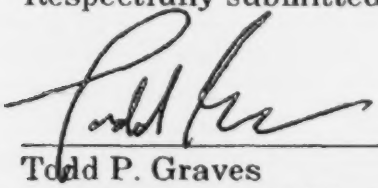
Such a preference is without any basis under Rule 24(a), since both types of advocates would have already proved the depth of their interests and their abilities to marshal unique arguments in the courts through months or years of prior political and legal efforts at the state level. Thus, the Sixth Circuit's new test is itself a political judgment about the value of different types of advocacy in this country. It is a judgment which courts should not be allowed to

make, since (as discussed in Petitioners' brief) it inevitably chills political speech and association. This Court should consider the serious issues raised by the circuit split induced by the Sixth Circuit's new test, and should ultimately reject that test as inconsistent with the text and spirit of Rule 24.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that the Court grant Petitioners' writ of certiorari.

Respectfully submitted,



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No. 07-1182

In The Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,

Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION and IMMIGRANT RIGHTS and FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,

Plaintiffs and Respondents,

And

JENNIFER GRANHOLM, et al.,

Defendants and Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully moves this Court, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amicus curiae* brief in support of Petitioners. Petitioners, Michigan Civil Rights Initiative Committee and American Civil Rights Foundation, granted consent to MSLF to file this *amicus* brief. Plaintiffs-Respondents and Defendants-Respondents did not respond to MSLF's request for consent to file this brief.

MSLF is a non-profit, public interest legal foundation that litigates in the public interest to promote and protect individual liberties guaranteed by the United States Constitution. It also litigates to ensure limited and ethical government that functions within the confines of lawful statutes and the Constitution. Moreover, MSLF has a long history of litigating in the areas of individual liberties and limited and ethical government.

MSLF's representation of "Yes" on Proposition 200 also provides a valuable perspective to this Court. "Yes" on Proposition 200 is an advocacy group that initiated, defended, and ultimately passed a ballot initiative in Arizona, but, in a case that reached this Court, was unable to intervene in one of the subsequent lawsuits challenging the measure's constitutionality. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5

(2006). "Yes" on Proposition 200 sought to intervene so that Proposition 200 would not be debilitated by a half-hearted legal defense, but was ultimately denied intervention. However, the Ninth Circuit recognized that "Yes" on Proposition 200 had an interest sufficient to intervene. *See Gonzalez v. Arizona,* 485 F.3d 1041, 1051-52 (9th Cir. 2007) ("intervenor satisfied the first three parts of the Rule 24(a)(2) test"). *Amicus Curiae*'s experience will assist this Court as it considers this petition.

Respectfully submitted,

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Dated: April 17, 2008

QUESTIONS PRESENTED

1. Whether the Sixth Circuit's departure from settled precedent in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007), was an erroneous interpretation of federal intervention standards that should be corrected by this Court?

2. Whether this Court should clarify the federal intervention standards to hold that a public interest group, as a matter of right, may intervene in an action challenging the legality of a measure that it initiated and supported?

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James E. Castello, *Note, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 Calif. L. Rev. 491 (1986) 4

Initiative & Referendum Institute, *Initiative Use, 1904-2005*, available *at* http://www.iandrinstitute.org/Usage.htm 5

Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 7C Fed. Prac. & Proc. Civ. 3d § 1901 (2008) 6

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

MSLF respectfully submits this *Amicus Curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 27(2)(a) a Motion For Leave to File an *Amicus Curiae* Brief precedes this brief.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the Courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals, who live and work in almost every State of the country, including the State of Michigan.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The Petitioners have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus Curiae hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. *See* Petitioners' Brief at 1-2.

SUMMARY OF THE ARGUMENT

The ballot initiative process is one of the few mechanisms for direct democracy in the United States. It permits disenfranchised citizens to marshal the public will and make legislative changes when their elected officials fail to heed their demands. As one of the most important participants in the process, an initiative's sponsors work at the grassroots level to draft the measure, promote its presence on the ballot, and advocate for its ultimate passage. In many cases, an initiative owes its very existence to its sponsors.

In spite of this, the Sixth Circuit has held that an initiative's sponsors do not have a sufficient interest to intervene in a lawsuit challenging the constitutionality of their enactment. Instead, the Sixth Circuit has held that defense of the initiative must be entrusted to state officials, even when these officials vehemently opposed the initiative. Despite a clear conflict of interest on the part of the government, in this case, Michigan's elected officials, the Sixth Circuit tersely held that "the public interest in the enforceability is entrusted for the most part to the government. . . . [because] [w]hen the government has

passed a law it can be trusted to administer it." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 786 (6th Cir. 2007).

Amicus Curiae urge this Court to reassess this presumption. The Sixth Circuit's *pro forma* interpretation of The Federal Rules of Civil Procedure, Rule 24 not only excludes the most knowledgeable and committed party from the litigation, but also conflicts with Supreme Court, Ninth Circuit, and its own precedent. In fact, *Amicus Curiae* suggest that this Court adopt a bright-line rule permitting an initiative's sponsors to intervene in litigation challenging the constitutionality of their enactment as a matter of right.

ARGUMENT IN SUPPORT OF PETITION

Amicus Curiae urges this Court to grant this petition to preserve the efficacy of the initiative process as a means of expressing popular will. Current intervention standards often exclude the proponents of a ballot initiative from the litigation that follows its adoption based on a presumption that state government officials will, merely by virtue of their positions, adequately defend these ballot measures. However, in many cases, the same state officials charged with defending the constitutionality of these laws vehemently opposed them during the initiative process. This conflict of interest could be mitigated through the intervention process.

Absent the ability to defend their measures in Court, an initiative's sponsors can often do little more than hope that their efforts will be defended and implemented according to their vision and the will of the voters. *Amicus Curiae* and Petitioners seek to clarify the federal rules and permit intervention in cases such as this one, so that those who conceptualize, promote, and foster the development of a ballot initiative can have their voices heard when the measure is challenged in Court.

A. THE INITIATIVE PROCESS

The ballot initiative process is essentially a democratic safety valve that permits the populace to express its collective will when the legislature is unresponsive. "A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative." *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005). In fact, the very purpose behind initiative and referendum is to "enable the voters to establish their supremacy over a corrupt and captured representative process." Julian N. Eule, *Judicial Review Of Direct Democracy*, 99 Yale L. J. 1503, 1545 and n. 182 (May 1990). *See also* James E. Castello, *Note, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 Calif. L. Rev. 491 (1986). As one of the few mechanisms for direct democracy in the United States, the initiative process mobilizes the power of citizens and enables them to develop and

enact legislation when their representatives fail to fulfill their duties to their constituents.

The first statewide initiative appeared on Oregon's ballot in 1904; today, 24 states have an initiative process. *See* Initiative & Referendum Institute, *Initiative Use, 1904-2005*, available *at* http://www.iandrinstitute.org/Usage.htm, last visited April 11, 2008. From 1904 to 2005, these states collectively placed 2,153 statewide measures on the ballot and adopted 877 (41%) of them. *Id.* The popularity of the initiative process has varied throughout American history, with usage peaking from 1910-1919 during which time 271 initiatives were adopted and hitting its nadir in 1960-1969 when only 98 initiatives were approved. In 1978, with the passage of California's Proposition 13, the initiative process became popular once again. Today, its usage has leveled-off at approximately 70 per two-year cycle and continues to be a frequently-used tool of effectuating the popular will. *Id.*

While the initiative process may be one of the most direct forms of representative government, the very nature of the initiative process often results in an odd irony. Successful initiatives frequently materialize when elected officials fail to address political issues considered important by their constituency. Thereafter, community groups or other advocacy organizations work to counteract legislative inertia through the initiative process by placing measures on the ballot and battling for their passage. In many cases, state officials vocally and visibly oppose these measures and work to defeat the initiatives at the polls.

If the initiative is successful, and the resulting law is challenged, the same state officials who had opposed the initiative then become ostensible defendants. Suddenly, those who had opposed the measure, become the measure's purported advocates. It is in cases such as these where intervention by the proponents of the initiative not only makes sense but also is mandated.

B. THIS COURT SHOULD OVERRULE THE SIXTH CIRCUIT'S DEPARTURE FROM SETTLED PRECEDENT IN *NORTHLAND FAMILY PLANNING*

Intervention permits an outsider with an interest in a lawsuit to enter as a party though the outsider has not been named as a party by the original litigants. Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 7C Fed. Prac. & Proc. Civ. 3d § 1901 (2008). Rule 24(a)(2) entitles a third party to participate in a litigation if he can establish, with fair probability, that the representation is inadequate. Fed. R. Civ. P. 24(a)(2), advisory committee notes. Rule 24(a)(2) provides that intervention as of right shall be granted to anyone who

> claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

In the Sixth Circuit, as in every other federal circuit, intervention must be granted if a proposed intervenor establishes four elements: (1) the motion to intervene is timely; (2) the intervenor has a substantial legal interest in the subject matter of the case; (3) its ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the Court may not adequately represent its interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999).

In the present case, notwithstanding Petitioners' "interest" in the survival of the initiative to which they gave legislative birth and their desire to be able to defend it, the Sixth Circuit denied intervention because Petitioners purportedly lacked a substantial legal interest in the lawsuit. *Granholm*, 501 F.3d at 783. The Court relied on *Northland Family Planning* and held that Petitioners' interest in the "enforceability of a statute in general [was] not cognizable as a substantial legal interest without the statute also regulating the organization or its members." *Id.* at 782 *citing Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007).

The Sixth Circuit's decision in the present case was not unanimous, however. In a vigorous dissent, Judge Kennedy sharply criticized the majority's reliance on *Northland Family Planning*, and *Northland*'s departure from settled precedent. *See Granholm*, 510 F.3d at 784-87. In his view, "[p]rior precedent was consistent in holding that interest was to be construed liberally and close cases should be

resolved in favor of recognizing an interest under Rule 24(a)." *Id.* at 785 *citing Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (internal quotations omitted). He also denounced *Northland Family Planning*'s "ignore[ance of] the basis for these holdings" and the Sixth Circuit's departure from years of consistent citation and approval of similar Ninth Circuit cases. *Granholm*, 510 F.3d at 784-85.

Judge Kennedy's reference to the Ninth Circuit is instructive because the Ninth Circuit requires only a "minimal burden" to intervene. *See Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir. 2003) *citing Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 (1972). The Ninth Circuit observes "practical and equitable considerations" and "generally interpret[s] the requirements broadly in favor of intervention." *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998). *See also United States ex rel. McGough v. Covington Techs. Co.,* 967 F.2d 1391, 1394 (9th Cir. 1992) ("Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations.") (internal quotation marks and citation omitted).

Until *Northland Family Planning*'s departure from precedent, the Sixth Circuit often looked to the Ninth Circuit's "minimal burden" standard for its precedents. For example, in *Michigan State AFL-CIO v. Miller*, the Sixth Circuit approvingly cited a Ninth Circuit holding that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that

legislation." *Miller,* 103 F.3d at 1245 *citing Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1397 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527 (9th Cir. 1983); *see also State of Idaho v. Freeman,* 625 F.2d 886 (9th Cir. 1980). *Miller* recognized "a rather expansive notion of the interest sufficient to invoke intervention of right," *Miller*, 103 F.3d at 1246, and did not require a specific legal or equitable interest to satisfy Rule 24. *Id.*

This "minimal burden" standard is well-established in the Ninth Circuit. In *Idaho v. Freeman*, the Ninth Circuit granted intervention to the National Organization for Women (NOW) in a suit challenging procedures for ratifying the Equal Rights Amendment. *Freeman,* 625 F.2d at 886-87. The Ninth Circuit held that NOW's interest in the "continued vitality of the ERA" was sufficient to satisfy Rule 24(a). *Id.* at 887. Similarly, in *Sagebrush Rebellion, Inc. v. Watt*, the Ninth Circuit held that "a public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it ha[d] supported" because an adverse decision would impair the [public interest group's] interests. *Sagebrush*, 713 F.2d at 527.

Prior to *Northland Family Planning*'s departure from these settled precedents, the Sixth Circuit shared the Ninth Circuit's liberal construction of Rule 24(a). *See Miller*, 103 F.3d at 1246. *Amicus Curiae* thus urge this Court, at a minimum, to grant the petition to consider whether *Northland Family Planning* represents an inadvisable departure from precedent from

the Ninth Circuit's and this Court's "minimal burden" standard. In addition, *Amicus Curiae* urge this Court to adopt a bright-line rule that an initiative's sponsors may, as a matter of right, intervene in litigation challenging the constitutionality of their enactment. This will ensure the vitality of the initiative process and preserve its function as an effective means for disenfranchised citizens to express their popular will.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* respectfully requests that this Court grant the petition.

Respectfully submitted,

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